

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

Decision Notice

Date: 1 December 2010

Public Authority: Mark Heap (District Auditor)
Address: 2nd Floor
Aspinall House
Aspinall Close
Middlebrook
Bolton
BL6 6QQ

Summary

The complainant requested from a District Auditor information generated by his (i.e. the District Auditor) audit of the sale of a golf course from a local authority to a third party. The District Auditor (a public authority for the purposes of the Environmental Information Regulations but not the Freedom of Information Act) relied on regulations 12(3), (4)(e), (5)(e) and (d) to withhold information. On reading the withheld information the Commissioner decided that, but for a minority of it, it was not environmental information and therefore it could not be considered further by the Commissioner. As to the minority of information that was environmental information the District Auditor had correctly applied regulation 12(5)(d) and therefore had rightly withheld it.

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.

AND

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

2. The functions of the Audit Commission are set out in the Audit Commission Act 1998 (the "ACA 1998"). In broad terms the Commission does two things:
 - It appoints auditors to conduct the annual audits of Local, Police and Fire Authorities and NHS bodies. The appointment of auditors and the powers and duties of those auditors are set out in Part 2 of the ACA 1998
 - It *may* itself carry out studies into performance and other matters, either because it considers that this would be useful, or at the invitation of an auditable body, or, in some cases, at the request of the Secretary of State. These matters are dealt with in Part 3 of the ACA 1998.
3. Section 3 of the ACA 1998 specifies that auditors may be an officer of the Commission (often referred to as "District Auditors") or another individual who is not an officer of the Commission or a "firm" of such individuals. Whether or not the appointed auditors are "officers" of the Commission, the powers that they exercise to gather information and produce reports for example are exercised by them personally and not on behalf of the Audit Commission. Whilst the Audit Commission is a public authority listed in Schedule 1 of the FOIA, District Auditors and other appointed auditors are not so listed and therefore the information which they hold is not accessible under the Act.
4. District Auditors appointed by the Audit Commission are however public authorities for the purposes of the EIR. This is because of how public authorities are defined in the EIR. The relevant parts of regulation 2(2) are as follows:

"(2) Subject to paragraph (3), "public authority" means–

(a) government departments

(b) any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act ...

(c) any other body or other person, that carries out functions of public administration..."

5. District Auditors fall within sub-paragraph (2) (c) as they carry out functions of public administration and therefore have an obligation to provide environmental information on request (if not excepted).
6. The District Auditor audited the accounts of Copeland Borough Council for 2006/07 following the complainant's objections to them under section 16 of the Audit Commission Act 1998. On 27 February 2009, the District Auditor informed the complainant of his decisions on his objections.

The Request

7. The complainant made a request to the District Auditor on 19 March 2009 for:
 - a. A copy of all correspondence and documentation between the Audit Commission and Copeland BC regarding the sale of Whitehaven Golf Course except for the documentation he had previously received from the public authority on 16 July 2008.
 - b. A copy of all the advice the District Auditor received in making his decision.
 - c. As the District Auditor has previously refused to supply a copy of the legal advice then, if this is to be the case again, provide the name, position, qualifications and date of qualification of the legal advisors used.
 - d. A testimony from the legal advisors that they were in full possession of the facts and had read the terms of the lease before advising the District Auditor that section 123 of the Local Government Act 1972 did not apply to Whitehaven Golf Course.
 - e. The Audit Commission, Audit Practice, Annual Quality Report indicates that the Auditor will ensure - "Sufficient appropriate

audit evidence is obtained. Audit processes, findings and conclusions are documented fully and clearly." Please supply a copy of this.

8. The District Auditor provided substantive responses to the complainant on 2 and 13 October 2009 in which it disclosed part of the information requested but withheld the remainder of the information on the basis of the exceptions contained in regulations 12 (3), (4)(e), (5)(e).
9. The complainant requested an internal review of the District Auditor's decision on 26 October 2009. On 18 December 2009 the District Auditor wrote to the complainant with the details of the result of the internal review that had been carried out. A result of the review was that the District Auditor now also relied (in addition to the above mentioned exceptions) on regulation 12(5)(b) and (5)(d) not to disclose certain of the withheld information.

The Investigation

Scope of the case

10. On 28 October 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

Chronology

11. By way of a letter dated 3 March 2010 the Commissioner requested that the District Auditor provide him with a copy of the withheld information and the answers to questions regarding his use of exceptions under the EIR to withhold information from the complainant.
12. The District Auditor provided a copy of the withheld information and answers to the Commissioner's queries by way of correspondence dated 15 March 2010.

Analysis

Is the information environmental?

13. Regulation 2(1) of the EIR defines 'environmental information' as having the same meaning as in Article 2(1) of Council Directive 2003/4/EC:

'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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)'.

14. In the Commissioner's view, the use of the word 'on' indicates a wide application and will extend to any information about, concerning, or relating to the various definitions of environmental information.
15. The withheld information consists of documents between the District Auditor and the legal department of the Audit Commission regarding the District Auditor's investigation of Whitehaven Golf Course and information generated by or acquired in the said investigation.
16. Having considered the information it is apparent to the Commissioner that most of it is not environmental information for the purposes of the regulations. In particular the overwhelming majority of

the withheld information comprises of information about the mechanics of the sale and valuation of the golf course. The Commissioner's view is that the mere valuation and the affixing of a sale price of property is not itself environmental. There may be environmental factors discussed or considered in the sale of property that would constitute environmental information but these are not apparent in this case. Similarly environmental factors could be apparent in the conditions of sale, such as restrictive covenants or contractual undertakings given by the purchaser to develop the purchased land in a particular way, however these are not apparent in this matter.

17. Whilst the majority of the information is not environmental there is a document titled "Western Lakes Ltd – Whitehaven Golf Course Development Plan" which, in the Commissioner view, is environmental. The document contains information about the site, its history and proposed plans for its development. The document also describes what work had been done to the land and the golf course and these clearly relate to factors concerned with the environment. Additionally the document lays out possible course developments which are clearly proposed measures that would, if undertaken, affect the environment. The District Auditor maintains that this information was obtained in his statutory capacity as the District Auditor of Copeland BC and solely for the purpose of discharging of his statutory legal functions i.e. the determination of an objection to the Council's 2006/07 accounts. The District Auditor relies on regulations 12(5) (d) and (e) to withhold this information. The Commissioner next considered whether the District Auditor was correct on relying on 12(5) (d). The District Auditor is not a public authority for the purposes of the Act. The Commissioner therefore cannot adjudicate upon, as against the District Auditor, any information that is not environmental information.

Exceptions

18. Regulation 12(5) states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
19. The Commissioner interprets "proceedings" as possessing a certain level of formality. Accordingly they are unlikely to encompass every meeting held / procedure carried out by a public authority. They will include (but may not be limited to):
- legal proceedings;

- formal meetings at which deliberations take place on matters within the public authority's jurisdiction; and
 - where a public authority exercises its statutory decision making powers.
20. Public authorities can only refuse to disclose information relating to proceedings where the confidentiality of those proceedings is provided by law. This includes common law or specific statutory provision. If the confidentiality of the proceedings is not provided by law, regulation 12(5) (d) will not apply.
21. The District Auditor maintains that the statutory process of investigating and determining objections under the Audit Commission Act 1998 amount to proceedings where confidentiality is provided by law. This, the District Auditor says, may apply both to the District Auditor exercising a quasi-judicial function in conducting investigations into objections and to a public body which is the subject of the objection. The District Auditor emphasises that the withheld information is held or generated by him exclusively for the purposes of investigating and determining an objection to a local authority's accounts. The District Authority considers that the confidentiality of proceedings is provided by law by, inter alia, section 49 of the Audit Commission Act 1998.
22. The Commissioner notes that section 49 (laid out in full in the legal annex hereto attached) of the Audit Act provides as follows:
- (1) No information relating to a particular body or other person and obtained by the Commission or an auditor, or by a person acting on behalf of the Commission or an auditor, pursuant to any provision of this Act or in the course of any audit or study under any such provision shall be disclosed except... (*in a number of specified circumstances not relevant here*)
23. Section 49 places an obligation on an auditor separately not to disclose any information that he has acquired unless specified circumstances are present, these specified circumstance do not apply in the facts of this matter. The disclosure of such information is a criminal offence. The Commissioner accepts as correct the District Auditor's explanation of how he acquired possession of the document titled "Western Lakes Ltd – Whitehaven Golf Course Development Plan" as explained in paragraph 17 above. Accordingly the Commissioner is satisfied that the information was acquired by the District Auditor in the course of an investigation that was, for the purposes of the EIR, a proceeding where confidentiality is provided by law (i.e. section 49 of the Audit Act 1998).

24. In view of the above, the Commissioner considers that the exception under regulation 12(5) (d) is engaged in respect of the withheld information. The Commissioner has therefore gone on to consider the public interest test factors, as considered by the District Auditor under this exception or advanced by the complainant.
25. **Public interest arguments in favour of disclosing the requested information**
- Disclosing the information may increase the understanding and trust of the public in the District Auditor's investigation and decision making process in the specifics of this case but also generally.
 - There is a public interest in the openness of how the District Auditor generally, but also particularly in this case, carries out his functions.
26. **Public interest arguments in favour of maintaining the exception**
- Releasing the information may undermine the relationship between the District Auditor and local authorities as regards the acquiring of material pertinent to investigations.
 - Releasing the information may undermine the relationship between the District Auditor and witness as regards the acquiring of material pertinent to investigations.
 - Releasing the information may undermine and debilitate the District Auditor's ability to audit.

Balance of the public interest arguments

27. In considering the public interest arguments the Commissioner notes that the Information Tribunal in *Ofcom v the ICO and T-Mobile* (EA/2006/0078, a case considered under the EIR) found at paragraph 58 that "for a factor to carry weight in favour of the maintenance of an exception it must be one that arises naturally from the nature of the exception. It is a factor in favour of maintaining that exception, not any matter that may generally be said to justify withholding information from release to the public, regardless of content". On appeal to the High Court Lord Justice Laws confirmed the Tribunal's approach as lawful, commenting (at paragraph 47) that "the Tribunal's view set out at paragraph 58 was indeed

reasonable; but more than that... it accords with the statutory scheme”.

28. The Commissioner acknowledges that there is a public interest in the transparency of the way this District Auditor specifically investigated the sale of the golf course but also how generally a District Auditor audits and investigates complaints made to him and how he generally carries out his functions. However the Commissioner does not consider that the disclosure of the withheld environmental information in this case would add significantly to the public’s understanding in this regard, as it is material that is specific to this particular golf course and not of value in the context of how the District Auditor’s went about his investigatory role and function. Far greater weight, however, is placed on the District Auditor’s ability to carry out his functions effectively. The District Auditor relies on his ability to acquire information in order to conduct investigations. Disclosing this information may discourage those that have relevant information from co-operating fully and frankly with the District Auditor in future for fear of the public dissemination of information provided to the District Auditor. The Commissioner, when considering factors that favour the maintenance of the exemption, gives due weight to the fact that the legislator has placed in statute (section 49 Audit Act 1998) that information received by a District Auditor, during a relevant investigation shall not be disclosed except in specified limited circumstances. The Commissioner’s conclusion in this matter is that the regulation 12(5)(d) exception applies to the requested information and that the public interest in maintaining the exception outweighs the public interest in disclosure. Having found that the District Auditor had correctly relied on regulation 12(5)(d) the Commissioner did not go on to consider the District Auditor’s reliance on 12(5)(e).

Procedural Requirements

29. Regulation 14(1) imposes an obligation on a public authority to issue a refusal notice (where it refuses to provide environmental information) and that should be provided to the complainant no later than 20 days after the request was made (regulation 14 (2)). As the public authority failed to issue such a notice within the required timeframe before the Commissioner’s involvement, it breached Regulation 14(2).

The Decision

30. The Commissioner's decision is that the public authority did deal with the request for environmental information in accordance with the EIR except for the procedural breach noted at paragraph 28 above.

Steps Required

31. The Commissioner requires no steps to be taken.

Right of Appeal

32. 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

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.

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 December 2010

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 –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“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);

“historical record” has the same meaning as in section 62(1) of the Act;
“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

“responsible authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

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 5(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

Regulation 5(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

Regulation 5(5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis,

sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to the standardised procedure used.

Regulation 5(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

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) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

Audit Commission Act 1998

Section 49

Restriction on disclosure of information.

(1) No information relating to a particular body or other person and obtained by the Commission or an auditor, or by a person acting on behalf of the Commission or an auditor, pursuant to any provision of this Act or of Part I of the Local Government Act 1999 or in the course of any audit or study under any such provision shall be disclosed except—

(a) with the consent of the body or person to whom the information relates;
(b) for the purposes of any functions of the Commission or an auditor under this Act

(c) in the case of a health service body, for those purposes or for the purposes of the functions of the Secretary of State and the Comptroller and Auditor General under the National Health Service Act 1977;

(d) for the purposes of the functions of the Secretary of State relating to social security;

(dd) to the Mayor of London, where the information relates to the Greater London Authority or a functional body;

(dd) for the purposes of the functions of an ethical standards officer or a Local Commissioner in Wales under Part III of the Local Government Act 2000

(e) in accordance with section 37(6) or 41(4); or

(f) for the purposes of any criminal proceedings.

(2) References in subsection (1) to studies and to functions of the Commission do not include studies or functions under section 36.

(3) A person who discloses information in contravention of subsection (1) is guilty of an offence and liable—

(a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both; or

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.