

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

Decision Notice

Date: 12 July 2011

Public Authority: Commission for Local Administration in England
(Local Government Ombudsman)

Address: 10th Floor
Millbank Tower
Millbank
London
SW1P 4QP

Summary

The complainant requested a copy of a complaint made by a third party and its associated correspondence from the Local Government Ombudsman. The council relied on sections 44 and 41 of the Freedom of Information Act 2000 and regulation 12(5)(d) of the Environmental Information Regulations 2004 to withhold the information. During the investigation, the Commissioner identified that it was appropriate to deal with the request under the Environmental Information Regulations 2004. The Commissioner found that the information held falls within the exception at regulation 12(5)(d) and that the public interest in maintaining the exception outweighs the public interest in disclosure.

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 are imported into the EIR.

The Request

3. On 7 November 2010 the complainant made the following request for information:

"Bearing in mind the drainage problems that remain unresolved following my three complaints, may I please (under the Freedom of Information Act) be provided with a copy of [named individual's] complaint, the council reply and your assessment and decision."
4. The Local Government Ombudsman ('the LGO') refused the request on 7 December 2010 stating that the information requested includes contents of a complaints file and that under section 32(2) of the Local Government Act, the LGO is not permitted to disclose any information obtained in course of, or for the purposes of, the investigation of a complaint. This appeared to be refusing the request under section 44 of the Act. The refusal also stated that section 41 of the Act would apply as the information was provided to the LGO in confidence and disclosure could amount to an actionable breach of confidence.
5. In addition, the refusal of 7 December 2010 stated that the Environmental Information Regulations entitle members of the public to information about the environment held by public authorities but this right is subject to certain exceptions, including where disclosure would adversely affect the confidentiality of the proceedings of that or any public authority where such confidentiality is provided by law and it would not be in the public interest to disclose it (Regulation 12(5)(d)). The LGO then stated that it had taken the complainants rights under these Regulations into account in deciding how to deal with the request.
6. On 14 January 2011, the complainant requested an internal review stating that the requested information is essential to his drainage complaint and directly affects public and property safety, including safety of life which he considers to be an overriding issue.
7. The LGO responded on 24 January 2011 stating that having reviewed the correspondence and other documents relating to the request, it is satisfied that the previous decision was appropriate and that the LGO should not disclose details of a complaint made by a third party, for reasons already given.

The Investigation

Scope of the case

8. On 7 February 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He provided background information in relation to the ongoing drainage issues and requested a review of the denial of 'essential information having a danger to life and property involved'.

Chronology

9. On 11 April 2011 the Commissioner wrote to the LGO stating that after a preliminary assessment, the withheld information appears to be environmental information and therefore requested that the LGO review the case and, if not prepared to disclose the information, submit a full rationale as to why the exception at regulation 12(5)(d) applies.
10. The LGO responded on 18 May 2011 confirming its view that the information should not be disclosed and providing further arguments for the application of regulation 12(5)(d).

Analysis

Is the information environmental?

11. 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)'.

12. 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.
13. The withheld information consists of an assessment made by the LGO in relation to a complaint about Wokingham Borough Council's actions in respect of a specified planning application, the complaint itself and correspondence in relation to the complaint. The Commissioner is satisfied that this constitutes environmental information by virtue of Regulation 2(1)(c) as it is information on a specific planning application, and related complaint, likely to affect the environment.

Exceptions

14. 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;
15. 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.
16. 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.
 17. Section 32(2) of the Local Government Act 1974 ('the LGA') provides a statutory prohibition on the disclosure of any information which was obtained in the course of or for the purposes of an investigation by the LGO. The full text of the legal provision can be found in the annex.
 18. The LGO have submitted that this statutory bar means that the LGO *shall not* disclose information except in furtherance of an investigation (or other limited circumstances). The LGO has also noted that, by virtue of section 28(2) LGA, each LGO investigation 'shall be conducted in private'.
 19. The Commissioner accepts that section 32(2) LGA acts as a statutory prohibition on disclosure of information obtained in the course of or for the purposes of an investigation and is satisfied that responding to a freedom of information request is not one of the reasons for disclosure provided for in sub-sections a) – c) of section 32(2).
 20. Having reviewed the withheld information, the Commissioner has found that most of the information was received by the LGO during the period in which it was investigating the complaint against Wokingham Borough Council. Where the information was passed to the LGO by Wokingham Borough Council or other third parties the Commissioner is satisfied that the information was obtained in the course of or for the purposes of the investigation and that the exceptions in (a) – (c) do not apply.
 21. The file also contains documents which were generated by the public authority and its officers in the course of investigating the complaint against Wokingham Borough Council. Whilst these documents may have been generated by the public authority itself, and have therefore not been physically obtained, it is clear that the information contained within the documents will have been obtained in the course of the investigation. Therefore it is the Commissioner's view that such information constitutes information obtained in the course of or for the purposes of the investigation and that the exceptions in (a) – (c) do not apply.

22. In view of the above, the Commissioner considers that the exception under regulation 12(5)(d) is engaged in respect of the withheld information.
23. However, as the EIR exceptions to the disclosure of information are subject to the public interest test, the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosing the information below.

Public interest arguments in favour of disclosing the requested information

24. The LGO has acknowledged that there is public interest in the public being aware of LGO investigations relating to environmental issues.
25. The Commissioner has also identified the following arguments in favour of disclosure:
 - There is public interest in the transparency of the way the LGO investigates complaints made to him.
 - There is public interest in the openness of how the LGO generally, and in relation to this case, carries out his functions.
 - Disclosure may increase the understanding and trust of the public in the LGO's investigation and decision making process both in the specifics of this case and generally.
26. The complainant has stated that release of the information is necessary to ascertain whether drainage issues had been considered, with reference to the Land Drainage Act 1991, in relation to the planning application that was the subject of the complaint to the LGO. He stated that there had been total disregard of the flooding of the area for some 10 years and that this was causing danger to property and life. He considers that provision of the withheld information is essential to his drainage complaint and that the safety of life is an over-riding issue.

Public interest arguments in favour of maintaining the exemption

27. The LGO have stated that the purpose of section 32(2) LGA and the maintenance of confidentiality for which that subsection provides includes;
 - not dissuading members of the public from making complaints;
 - encouraging frankness and openness on the part of those providing information to the LGO;

- giving effect to the reasonable expectation of confidentiality on the part of those submitting information to the LGO;
 - thereby facilitating the effective discharge of the LGO's functions.
28. The LGO also quoted the following reasons for maintaining the exception from previous Decision Notices (references FER0065671 and FER0349527):

"It is clear that parties submitting information to the LGO would have expected it to be held in absolute confidentiality, particularly due to the statutory prohibition in place. In addition, investigation reports published by the LGO are anonymised, with place and party names being replaced with aliases and pseudonyms. It is noted that section 32 of the Local Government Act even curtails LGO investigators being called upon to give evidence in legal cases other than in specified circumstances in order to protect the confidentiality of such information."

"A disclosure of such information would breach this understanding of confidentiality, and has the potential to cause complainants and witnesses to withhold information or curtail evidence to protect them from exposure in future requests. It is also possible that the knowledge that such disclosures are possible will prevent or dissuade members of the public from making a complaint in the first instance, thereby diminishing a strong element of accountability and scrutiny which is currently in place. Any detrimental impact upon the LGO's ability to receive information in confidence may therefore adversely affect his ability to investigate complaints in the future, to the detriment of the general public and the public interest in transparency and accountability."

29. In addition, the LGO have stated that where there is public interest in the public being aware of LGO investigations relating to environmental issues, where appropriate the LGO publish this information.
30. In considering the public interest, the Commissioner highlights the review of the statutory prohibitions on disclosure by the Secretary of State for the Department for Constitutional Affairs in which it was decided that section 32 (2) of the Local Government Act should stand as an ongoing prohibition and that information pertaining to such investigations should, in the vast majority of cases, be outside the bounds of the information access provisions. The Commissioner therefore considers that there must be strong arguments for disclosing information covered by section 32(2) LGA.

31. In addition, the Commissioner considers that there is public interest in allowing organisations under investigation to provide information required by the LGO in confidence and disclosure may undermine the relationship between the LGO and the public authorities it investigates.

Balance of the public interest arguments

32. In considering the public interest arguments the Commissioner notes that the Information Tribunal in *Ofcom v the ICO and T-Mobile* found 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”¹. 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”.
33. The Commissioner is of the opinion that the arguments presented in favour of maintaining the exception do arise naturally from the nature of the exception and has therefore given them due weight.
34. The Commissioner acknowledges that there is a public interest in the transparency of the way the LGO investigates complaints made to him and how he generally carries out his functions. However, he considers that this factor is met by the provision of other information, for example, the publication of ‘Complaint outcomes’ on the LGO website. The Commissioner does not consider that the disclosure of requested information in this case would add significantly to the public’s understanding in this regard.
35. Far greater weight, however, is placed on the LGO’s ability to carry out his functions effectively. The LGO relies on his ability to acquire information in order to conduct effective investigations. Disclosing this information may discourage those that have relevant information from co-operating fully and frankly with the LGO in future for fear of the public dissemination of such information.
36. The Commissioner, when considering factors that favour the maintenance of the exemption, gives significant weight to the fact that the legislator has placed in statute (section 32(2) LGA) that

¹ Appeal no. EA/2006/0078, para 58

information received by the LGO during a relevant investigation shall not be disclosed except in specified limited circumstances.

37. The complainant's argument that release of the information is necessary to ascertain whether drainage issues, having an impact of the safety of property and life, had been considered are noted by the Commissioner. However, from documentation on the case, the Commissioner is aware that the complainant has highlighted these drainage issues as objections to a planning application and as complaints to the LGO. As such, he believes that there are alternative mechanisms of dealing with these issues therefore the complainants line of argument does not counter the public interest arguments in favour of maintaining the exception in this case. Furthermore, it is not the Commissioner's role to adjudicate on issues in relation to the Land Drainage Act 1991.
38. The Commissioner recognises that the public interest arguments in favour of maintaining the exception provide a high threshold which needs to be surpassed before a decision in favour of disclosure would be made. The Commissioner's decision in this case is that that the threshold has not been met.
39. Therefore the Commissioner's conclusion is that the exception to the duty to disclose environmental information at Regulation 12(5)(d) applies to the requested information.

The Decision

40. The Commissioner's decision is that the public authority dealt with the request for information in accordance with 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@tribunals.gsi.gov.uk

Website: www.informationtribunal.gov.uk

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 July 2011

Signed

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

Legal Annex

Environmental Information Regulations 2004

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 12 – Exceptions to the duty to disclose environmental information

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.

Local Government Act 1974

Section 28(2) states:

(2) Every investigation under this Part of this Act shall be conducted in private, but except as aforesaid the procedure for conducting an investigation shall be such as the Local Commissioner considers appropriate in the circumstances of the case; and without prejudice to the generality of the preceding provision the Local Commissioner may obtain information from such persons and in such manner, and make such inquiries, as he thinks fit, and may determine whether any person may be represented (by counsel or solicitor or otherwise) in the investigation.

Section 32 (2) states:

(2) Information obtained by a Local Commissioner, or any officer of either Commission, in the course of or for the purposes of an investigation under this Part of this Act shall not be disclosed except—

- a) for the purposes of the investigation and of any report to be made under section 30 or section 31 above; or
- b) for the purposes of any proceedings for an offence under the Official Secrets Acts 1911 to 1939 alleged to have been committed in respect of information obtained, by virtue of this Part of this Act, by a Local Commissioner or by an officer of either Commission or for an offence of perjury alleged to have been committed in the course of an investigation under this Part of this Act or for the purposes of an inquiry with a view to the taking of such proceedings, or
- c) for the purpose of any proceedings under section 29(9) above

and a Local Commissioner and the officers of his Commission shall not be called upon to give evidence in any proceedings (other than proceedings within paragraph (b) or (c) above) of matters coming to his or their knowledge in the course of an investigation under this Part of this Act.