



Information Commissioner's Office
Promoting public access to official information
and protecting your personal information

FREEDOM OF INFORMATION ACT 2000 (SECTION 50)
and
THE ENVIRONMENTAL INFORMATION REGULATIONS 2004

DECISION NOTICE

Dated 23 March 2006

Name of Public Authority: The Commission for Local
Administration in England; (The
Local Government Ombudsman).

Address of Public Authority: The Oaks
No 2 Westwood Way
Westwood Business Park
Coventry
CV4 8JB

Nature of Complaint

The Information Commissioner (the "Commissioner") has received a complaint from the above person (the "complainant") which states that on the 20th January 2005 the following information was requested from The Local Government Ombudsman:

"A copy of any information which is held as a result of any investigation carried out by the Local Government Ombudsman (LGO) into the planning and construction of the complainant's property in XXXXX."

It is alleged that:

The LGO incorrectly applied section 44 of the Freedom of Information Act 2000 ('the Act') in refusing to supply the information to the complainant.

The LGO incorrectly applied Regulation 12 of the Environmental Information Regulations 2004 ('the Regulations') in refusing to disclose any environmental information to the complainant.

The Commissioner's Decision

In providing this decision the Commissioner notes that the LGO has neither confirmed nor denied that he holds information for the purposes of the request.

The information requested by the complainant may include both environmental information as defined in Regulation 2 of the Regulations and information falling within the scope of the Act.

Under section 50 of the Act, except where a complainant has failed to exhaust a local complaints procedure, or where the complaint is frivolous or vexatious, subject to undue delay, or has been withdrawn or abandoned, the Commissioner is under a duty to consider whether the request for information has been dealt with in accordance with the requirements of Parts 2 and 3 of the Regulations and Part 1 of The Freedom of Information Act 2000, and to issue a Decision Notice to both the complainant and the public authority.

A full explanation of the Commissioner's decision is included in the attached statement of reasons.

1. Section 32(2) of the Local Government Act 1974 provides a statutory prohibition on the disclosure of any information which was obtained as a result of any investigation by the LGO. Therefore the Commissioner's decision is that any information held by the LGO which was obtained in response to any investigation he may have carried out is exempt from disclosure under section 44 of the Act.
2. Any information which is held which falls within the definition of environmental information (as defined in Regulation 1 of the Regulations), is exempt from disclosure by virtue of Regulation 12(5)(d), in that disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.
3. As regards information falling within the scope of the request which falls within the definition of environmental information, the Commissioner considers that the public interest is best served by maintaining the exception in this instance.

Action Required

In view of these matters the Commissioner hereby gives notice that in exercise of his powers under section 50 of the Act he does not require any remedial steps to be taken by The Local Government Ombudsman.

Right of appeal

Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process can be obtained from:

Information Tribunal	Tel: 0845 6000 877
Arnhem House Support Centre	Fax: 0116 249 4253
PO Box 6987	Email: informationtribunal@dca.gsi.gov.uk
Leicester	
LE1 6ZX	

Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

Dated the 23rd day of March 2006

Signed:

Richard Thomas
Information Commissioner

Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

The Relevant Provisions

Section 1(1) provides that –

General Right of Access to Information Held by Public Authorities

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

Section 44 of the Act states. -

Prohibitions on disclosure

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

Local Government Act 1974

Section 32 (2) of the Local Government Act 1974 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.

The Environmental Information Regulations 2004

Regulation 12 of the Environmental Information Regulations states:

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.

2) A public authority shall apply a presumption in favour of disclosure.....

Paragraph 5 of Regulation 12 states:

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 –

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;

Statement of Reasons

The complainant wrote to the Local Government Ombudsman (LGO) requesting any information pertaining to any investigation carried out by the Ombudsman's Office into the agreement of an application for planning on the complainant's property by the Local Council. The LGO responded by claiming that if they did hold any information it would be exempt under section 44 of the Act. Further to this the Ombudsman stated that he could neither confirm nor deny whether such information was held.

Section 44 is an absolute exemption which is applicable where a statutory provision prohibits the disclosure of the information in question. In this case, the LGO is subject to a statutory prohibition on the disclosure of any information obtained in the process of carrying out an investigation under section 32 (2) of the Local Government Act 1974. The Commissioner is satisfied that this section is applicable to any information held which would fall within the scope of the complainant's request, unless that information would fall within the definition of environmental information for the purposes of the Regulations.

The Commissioner wrote to the LGO stating that in such investigations it was possible that some or all of the information obtained may fall within the definition of environmental information. The LGO considered the merits of this and agreed that it was possible that the LGO could obtain and hold environmental information as a result of any investigation it may carry out.

Any environmental information held by the LGO which falls within the scope of the request should be considered under the Regulations rather than under Act. The absolute exemption provided in section 44 of the Act is not therefore applicable.

Regulation 12(5)(d) of the EIR provides an exception for information where disclosure would “adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law”.

The Commissioner recognises that the statutory prohibition on disclosure in section 32 (2) of the Local Government Act 1974 would mean that any information held by the LGO would fall within the scope of this exception.

However under Regulation 12 (1) (b) exceptions to the disclosure of environmental information are subject to a public interest test. Regulation 12 (1) (b) states that an authority may only refuse to disclose information if an exception applies and:

“In all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.”

The question is therefore whether the public interest in maintaining the exception would outweigh the public interest in disclosing any environmental information which might fall within the scope of the request. This would involve both an analysis of the information and of the issues to hand.

In this case the complainant lives in a house which is apparently the subject of many complaints from the local community. Apparently the complaints relate to the fact that planning permission was granted for a house which is allegedly not in keeping with the character of the village, adversely affects the scenic view from the main street in the village, overwhelms and detracts from other listed properties within the village, and encroaches upon the privacy of proximate houses. There is also some consternation as the property lies adjacent to a conservation area. Many of the local community are angry that planning permission was granted by the Local Councillors against the recommendation of the Planning Officers, and suggest that the Council acted inappropriately or unjustly in allowing permission.

As a result of a concerted campaign by some parties this has become an issue of note amongst the local community, with parties from both sides of the argument, (and the Council itself) making comments in the local newspaper. There have been statements made by objectors in the local press to the effect that they were taking legal steps to get planning permission revoked and the

building “bulldozed”. The complainant’s property has also allegedly been the subject of criminal damage in that graffiti was daubed on a garage. The complainant therefore believes that the LGO may have carried out an investigation of this, and has requested that he is provided copies of any information held as a result of such an investigation.

The LGO’s remit on any complaint would be to investigate the actions and procedures of the Council in handling the planning application, rather than any wider investigation as to whether the decision to allow the planning application was correct in the circumstances. It is recognised therefore that any environmental information held by the LGO would be incidental to the main purpose of obtaining information for the purposes of carrying out an investigation into the Council’s administrative actions.

The Commissioner recognises that a disclosure of any investigation files held by the LGO would inform the ongoing debate in the local community about the Council’s actions in agreeing planning permission.

Given the threats to this property in the local community there is a strong element of public interest in the complainant having access to any information held by the LGO which could materially affect his property and therefore his way of life. Disclosure would inform the complainant as to any issues within the investigation which could possibly directly affect him or his property in any future actions against his property. In this way he may make representations defending his property in full knowledge of the issues should the need ever arise. There is therefore an element of a protection of “the right to justice” in allowing the disclosure of any information held.

However, it is clear from the recent review of the statutory prohibitions to disclosure by the Secretary of State for the Department for Constitutional Affairs 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.

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.

The Commissioner therefore recognises that the public interest arguments in favour of withholding the information provides a high threshold which needs to be surpassed before a decision in favour of disclosure would be made. The Commissioner's decision is that in this case that threshold has not been met.

In this case therefore the Commissioner's decision is that the public interest is best served by allowing the application of the exception to the duty to disclose environmental information at Regulation 12 (5) (d) to any environmental information that may be held.