

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

Decision Notice

Date: 24 August 2009

Public Authority: Natural England
Address: Head Office
1 East Parade
Sheffield
S1 2ET

Summary

The complainant requested information in relation to a dune restoration project at Ainsdale sand dunes in Merseyside. The public authority disclosed some information at the time of the request as well as during the course of the Commissioner's investigation and consequently confirmed it did not hold any additional information matching the request. After considering the case, the Commissioner is satisfied that on a balance of probabilities, the public authority does not hold any information in relation to the request other than that already disclosed to the complainant.

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. 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 public authority is the statutory body charged with preserving and improving England's natural environment. As part of its functions, it establishes and manages National Nature Reserves. It was therefore pursuant to its statutory

functions that the public authority decided to carry out dune restoration in Ainsdale sand dunes, a National Nature Reserve in Sefton, Merseyside.

3. The dune restoration project was opposed by a number of groups including the Sefton Coast Watch. The principal objections were aimed at the proposed felling of trees. The objectors argued that this would adversely affect a number of endangered species including the red squirrel population at Ainsdale sand dunes.
4. Regulation 2 of the EIR defines 'environmental information'. The Commissioner is satisfied that the information requested falls within the description in Regulation 2.
5. A full text of Regulation 2 is available in the Legal Annex to this Notice.

The Request

6. On 08 November 2007, the complainant requested:

'....all correspondence, both postal and electronic, regarding the Sefton Coast management, between the public authority's Sheffield, Wigan, Ainsdale offices and DEFRA, Bristol (and vice- versa) – covering the last three years.'
7. The public authority responded on 22 January 2008. It disclosed 22 documents it considered matched the complainant's request and went on to explain it held no additional information in relation to the request.
8. On 01 February 2008, the complainant requested an internal review. The public authority completed its review and wrote back to the complainant on 26 February 2008 confirming it held no additional information matching his request.

The Investigation

Scope of the case

9. On 07 May 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
10. The complainant explained that the information disclosed by the public authority was primarily correspondence produced in 2007 relating to its parliamentary petition.
11. The complainant also specifically argued that *'with such a controversial issue such as dune restoration with strong public opposition, we find it inconceivable that* (Huw Thomas, Head of National Designated Sites (NDS) at DEFRA), (Sir Martin Doughty, Chairman of Natural England), and Paul Green (Area Manager, Cheshire to Lancashire, Natural England) *didn't correspond between themselves.'*

Chronology

12. On 11 May 2009 the Commissioner wrote to the complainant outlining the scope of the investigation and also asked the complainant to submit any evidence (if any) in support of the claim that the public authority held additional documents in relation to his request.
13. The complainant responded on 17 May 2009. He explained that he had written separately to the head of the NDS, and the Chairman (Chair) of the public authority regarding the concerns in relation to the dune restoration plans. He also added that the Chair was aware of his correspondence with DEFRA. Copies of the relevant letters were provided to the Commissioner by the complainant.
14. On 27 May 2009, the Commissioner wrote to the public authority inviting its submissions.
15. On 15 July 2009, the public authority responded. It explained that having reviewed its files, it had discovered some correspondence from early 2004 matching the complainant's request which were not previously disclosed to him.
16. The Commissioner wrote again to the public authority on 20 July 2009 and received a response to his queries on 28 July 2009.
17. On 22 July 2009 the public authority disclosed the additional documents it held to the complainant.

Analysis

18. A full text of all the statutory provisions referred to in this section can be found in the Legal Annex.

Regulation 5(2)

19. Under Regulation 5(2) of the EIR, a public authority is required to disclose information requested under the EIR as soon as possible and no later than 20 working days following the request.
20. The Commissioner therefore finds the public authority in breach of Regulation 5(2) for the late disclosure of the information made available to the complainant in January 2008 as well as the late disclosure of the additional information in July 2009.

Regulation 12(4)(a)

21. By virtue of the above Regulation, a public authority is not required to disclose information if it was not held at the time of the request.

22. The Commissioner has to determine therefore whether at the time of the request, apart from the information already provided to the complainant, the public authority held information matching the complainant's request.
23. The Commissioner does not consider it a requirement, however, for him to conclusively determine whether the requested information is held. Instead, he will decide on a 'balance of probabilities' (similar to the test used by the civil courts) whether additional information matching the complainant's request is held by the public authority. In Information Commissioner v Environmental Agency (EA/2006/0072), the Information Tribunal (Tribunal) explained that the application of the 'balance of probabilities' test to determine whether information is held requires a consideration of a number of factors including the quality of the public authority's final analysis of the request, scope of the search it made on the basis of that analysis and the rigour and efficiency with which the search was then conducted. It will also require considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.
24. The public authority explained that pursuant to the request as well as the Commissioner's investigation, it had searched the following places to locate the information requested:
 - The National and Regional Office Registries
 - The Knowledge Management and Information Services team file server
 - The Sheffield office file sever
 - The Wigan office server (which is no longer operational)
 - The old English Nature National Server (S Drive)
 - Natural England National Drive (N Drive)
25. The Commissioner understands the searches above would have included the email accounts of the Chair and Area manager. However, in terms of the Chair, the public authority explained that any such interaction with the head of the NDS would have been in print rather than electronically, and the correspondence files do not contain any such specific correspondence between the relevant parties.
26. The public authority also explained that the management of National Nature Reserves is part of its statutory functions and whilst it may consult other expert bodies and stakeholders, it is rare that there is dialogue with DEFRA over individual sites such as Ainsdale. It explained that there had been an independently commissioned review of dune restoration as well as a public consultation over the environmental impact assessment of dune restoration.
27. According to the public authority, the public consultation resulted in major changes to its plans for dune restoration from open clear-felling to more selective thinning of trees in key areas. DEFRA was therefore satisfied with its approach and had never questioned the need for dune restoration at Ainsdale. The Commissioner notes that a letter from DEFRA to the complainant dated 09 November 2004 explained that an environmental impact assessment was conducted in March 2004. There is nothing to suggest from that letter that DEFRA was dissatisfied with the restoration plans particularly in relation to the impact of

any potential tree-felling on endangered species including red squirrels at Ainsdale NNR.

28. In terms of the specific query regarding correspondence between the head of the NDS at DEFRA and the public authority's Chair and Area Manager, the Commissioner notes from the information disclosed to the complainant that there was some communication between officials at DEFRA and the public authority regarding the dune restoration project. There is however no indication as far as the Commissioner can see that any of the documents disclosed to the complainant refer to correspondence between the Chair and/or Area Manager and the head of the NDS which was generated in relation to the dune restoration project at Ainsdale.
29. On this specific point, the public authority explained that due to DEFRA's satisfaction with its approach, there had never been any direct contact between the Chair and the head of the NDS apart from two informal telephone conversations. The telephone conversations were not recorded and it had no policies regarding the recording of telephone calls. In any event, the request was for correspondence rather any communication between the parties.
30. The documents disclosed to the complainant consist primarily of internal correspondence generated regarding the public authority's handling of objections to the dune restoration project. It also includes correspondence with DEFRA officials as well as MPs.
31. The letters from the complainant to the parties in question (ranging from 2001 to 2008) essentially contain the complainant's arguments against aspects of the dune restoration project. The complainant also called for a 'debate' between DEFRA and the public authority regarding the objections to the project. In DEFRA's case, although the complainant wrote directly to the head of the NDS, it would appear the responses to his queries were delegated to senior officials who in turn consulted with the public authority's officials before responding. There is nothing to suggest from any of the responses he received that the parties in question were in direct correspondence with each other regarding his queries.
32. The Commissioner accepts that due to the controversy generated by the project especially the planned felling of trees, it was not unreasonable for the complainant to assume that the parties in question would have corresponded with each other. However, there is nothing to suggest from the evidence he has considered that such interaction did occur.
33. Therefore, in light of the searches conducted and the explanation provided by the public authority, the Commissioner is persuaded that 'on a balance of probabilities', the public authority does not hold any additional information matching the complainant's request.
34. Regulation 12(1)(b) states that all exceptions are subject to the public interest test, however the Commissioner does not consider that it will usually be possible to consider the public interest in respect of information which is not held.

The Decision

35. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- It was correct to conclude that it did not hold any information matching the complainant's request other than the information disclosed in January 2008 and July 2009.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- It breached Regulation 5(2) by the late disclosure of the information made available to the complainant in January 2008 and July 2009.

Steps Required

36. The Commissioner requires no steps to be taken.

Right of Appeal

37. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

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 served.

Dated the 24th day of August 2009

Signed

**Lisa Adshead
Senior FOI Policy 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

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- (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;

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and

“working day” has the same meaning as in section 10(6) of the Act.

Regulation 2(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, but excluding –
 - (i) any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or
 - (ii) any person designated by Order under section 5 of the Act;
- (c) any other body or other person, that carries out functions of public administration; or
- (d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and –
 - (i) has public responsibilities relating to the environment;
 - (ii) exercises functions of a public nature relating to the environment; or
 - (iii) provides public services relating to the environment.

Regulation 2(3) Except as provided by regulation 12(10) a Scottish public authority is not a “public authority” for the purpose of these Regulations.

Regulation 2(4) The following expressions have the same meaning in these Regulations as they have in the Data Protection Act 1998(b), namely –

- (a) “data” except that for the purposes of regulation 12(3) and regulation 13 a public authority referred to in the definition of data in paragraph (e) of section 1(1) of that Act means a public authority within the meaning of these Regulations;
- (b) “the data protection principles”;
- (c) “data subject”; and

(d) “personal data”.

Regulation 2(5) Except as provided by this regulation, expressions in these Regulations which appear in the Directive have the same meaning in these Regulations as they have in the Directive.

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 - 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 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(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

Regulation 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

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 the Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

Regulation 12 (6) For the purpose of paragraph (1), a public authority may respond to a request by neither confirming or denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

Regulation 12(7) For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

Regulation 12(8) For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

Regulation 12(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

Regulation 12(10) For the purpose of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

Regulation 12(11) Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.