

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

Decision Notice

Date: 21 September 2009

Public Authority: Vale of Glamorgan Council
Address: Civic Offices
Holton Road
Barry
CF63 4RU

Summary

The complainant requested information from the Vale of Glamorgan Council ('the Council') regarding the contractual arrangements it had entered into with a third party in relation to the sale of a particular piece of land. The Council considered the complainant had not made a valid information request and failed to confirm or deny whether it held information relevant to the request, or provide any information, where it was not exempt from disclosure. The Council has not provided an appropriate response to the request, despite the intervention of the Commissioner. The Commissioner considers that the information requested, if held, would be environmental information and should have been considered under the EIR. In failing to consider the request in accordance with the provisions of the EIR, the Council has breached regulation 5(2) of the EIR. The Commissioner requires the Council to either provide the information requested or issue a valid refusal notice that complies with regulation 14 of the EIR within 35 days of the date of this notice.

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 Commissioner. In effect, the enforcement provisions of Part 4 of the Act are imported into the EIR.

Background

3. This complaint relates to information about the disposal of surplus land at Cemetery Road, Barry. The Council agreed a contract with Newydd Housing Association (1974) Limited on 20 June 2007 for the sale of the land at Cemetery Road, Barry. The Council subsequently received a planning application from Newydd Housing Association (1974) Ltd on 7 August 2007 in respect of a proposed development on the land in question. The Council and Newydd Housing Association (1974) Limited executed a supplementary agreement in respect of the sale and purchase of the land in question on 5 June 2008.
4. The request has been made by the applicant on behalf of a voluntary group (the Group) which has been campaigning to prevent any high density housing development on the land in question. The request in this case focuses on the new contractual arrangements between the Council and Newydd Housing Association relating to the supplementary agreement made on 5 June 2008.

The Request

5. The complainant wrote to the Council on 26 October 2008. He referred to a letter dated 1 September 2008 which the Council had written to the Group regarding the new contractual arrangements between the Council and Newydd Housing Association in relation to the sale of land at Cemetery Approach. The information requested by the complainant consisted of a series of questions as detailed below:
 - 1) "The date it was considered necessary to draw up a new contract.
 - 2) Why was a new contract considered to be necessary.
 - 3) On what authority was the new contract drawn up.
 - 4) What were the conditions contained in the new contract.
 - 5) Why was the existence of the new contract concealed in answers to the public and information presented to Council committees addressing contractual arrangements.
 - 6) How and when were new and former Cabinet members and Councillors informed of the new contract.
 - 7) Has the price of land been revised in the new contract.
 - 8) If the price has been revised is it more or less than the initial contract.
 - 9) Is the deposit paid by Newydd in jeopardy should they not pursue or are unsuccessful in a planning appeal".
6. The Council acknowledged the letter on 5 November 2008 advising that the letter would be forwarded to the appropriate service area for consideration.
7. The Council responded to the complainant on 9 December 2008 stating that it had responded to a series of queries concerning the land at Cemetery Road, Barry made by the Group, directly or via the Public Services Ombudsman for

- Wales. The Council advised that having regard to its contractual relationship with Newydd Housing Association, and the time and associated costs in dealing with ongoing queries relating to the matter, it asked the complainant to explain the reason for the further queries raised in his letter of 26 October 2008.
8. The complainant wrote to the Council on 19 December 2008 expressing disappointment with its response dated 11 November 2008 as he felt it was unclear whether the Council was claiming that the information requested had already been provided, that it did not have to provide the information or that the Council was stating it was too time consuming or expensive to respond to the request. The complainant also stated that he was unaware of any legal obligation on him to explain the reason for his information request.
 9. The complainant wrote to the Council again on 14 January 2009 and 26 January 2009 asking for a substantive response to his request.

The Investigation

Scope of the case

10. The Commissioner received contact from the complainant on 30 January 2009. The complainant expressed dissatisfaction that he had not received a substantive response from the Council in relation to his request.

Chronology

11. On 11 February 2009 the Commissioner wrote to inform the Council that a complaint had been received and reminded it of its statutory duty to respond to the request within 20 working days. The Commissioner advised the Council that it should write to the complainant within 10 working days to advise whether or not the information requested was held. If the Council did hold the information, the Council should either provide it, or issue a valid refusal notice in accordance with the requirements of section 17 of the Act or regulation 14 of the EIR.
12. On 4 February 2009 the Council wrote to the complainant stating that the access regimes provided by the Act and the EIR “does not apply to the raising of questions which is outside the scope of the legislation”. The Council re-iterated that it had previously provided information to the Group via its different members under both access regimes and the Council was satisfied that the response provided to the complainant on 9 December 2008 was reasonable in the circumstances.
13. On 5 March 2009 the complainant wrote to the Council asking for details of its appeals process. The complainant subsequently asked the Council for a response to this letter on 4 April 2009.
14. On 13 May 2009 the complainant contacted the Commissioner to again complain about the Council’s refusal to disclose the information requested and the delays

experienced in the Council responding to his request for details of its appeals process. Due to the lack of response from the Council, the complainant asked the Commissioner to intervene on his behalf.

15. On 10 June 2009 the Commissioner wrote to the Council advising that he believed the complainant's request dated 26 October 2008 to constitute a valid request for the purposes of section 8 of the Act. The Commissioner referred the Council to the Information Tribunal case of Richard Day vs the Information Commissioner (EA/2006/0069), which dealt with the issue of questions being asked of a public authority. The Commissioner again requested that the Council issue a response to the complainant in accordance with the Act. The Commissioner also wrote to the complainant at the same time confirming that he had asked the Council to respond to his request of 28 October 2008 as he considered it to be a valid request.
16. The complainant contacted the Commissioner on 13 July 2009 to advise that he had still not received any communication from the Council.
17. On 27 July 2009 the Commissioner received a letter dated 21 July 2009 from the Council. The Council remained of the view that the complainant's request dated 26 October 2008 was not a valid request under either access regime.

Analysis

Is the information environmental?

18. The Commissioner has firstly considered, if the information requested is held, which access regime the Council should apply to the request - the Act or the EIR. Regulation 2 of the EIR deals with the interpretation of environmental information and the relevant provisions have been set out in full in the Legal Annex at the end of this Notice.
19. The Commissioner takes the view that the information requested, if held, would fall within the definition of environmental information as set out in regulation 2(1)(c). This is because he considers that a contract relating to the sale and development of a piece of land is a measure which is likely to affect the elements of the environment as set out in regulation 2(1)(a), in particular land and landscape. He considers that the information requested, if held, would qualify as information on (concerning, relating to, or about) this measure.

Has a valid request been made?

20. Having established that the information requested, if held, would fall within the definition of environmental information, the Commissioner has gone on to consider whether the information request dated 26 October 2008 constitutes a valid request.

21. In its letter to the Commissioner dated 21 July 2009 the Council maintained its view that the complainant's request dated 26 October 2008 was not a valid request as it considered the request to be a series of questions to the authority rather than requests for information. The Council also referred to the fact that none of the questions contained in the request asked for a specific document and the complainant had ended his letter "I look forward to your response in due course" rather than "I await the information requested" or something similar. The Council believed this reinforced its view that the request was not a valid request.
22. The Council again referred to previous correspondence with the Group and advised the Commissioner that if his decision was that the complainant's request was a valid request, it wished to reserve the right to consider the application of section 14 of the Act in relation to vexatious and repeated requests.
23. In considering whether the request of 26 October 2008 is a valid request, the Commissioner has been guided by the Information Tribunal cases of Richard Day & DWP (EA/2006/0069) and Fowler & Brighton & Hove City (EA/2006/0071). In both these cases, whilst some of the information requested by the applicant consisted of a number of questions, the Tribunal's view was that the authority may hold recorded information which would answer the question raised, and as such, the question would constitute a valid request under the Act or the EIR.
24. Some of the requests made by the complainant in this case appear to be relatively straightforward requests for recorded information. For example, part 3 of the request "what were the conditions contained in the new contract". Other parts of the request appear, on the face of it, to be questions posed to the Council, for example, parts 2 and 3 of the request - "why was a new contract considered to be necessary" and "on what authority was a new contract drawn up". It is always possible that the Council may hold recorded information which answers such questions. For example, there may have been a report prepared for the Council explaining why a new contract was deemed to be necessary.

Procedural Requirements

25. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request. Regulation 5(2) states that this information shall be made available as soon as possible and no later than 20 working days after the date of receipt of request. The complainant made the request on 26 October 2008 and up to the date of this Notice, the Council has not provided a response in accordance with the requirements of regulation 5, or issued a valid refusal notice in accordance with regulation 14.
26. Neither the EIR nor the Act requires public authorities to create information in order to respond to a request. The obligation is to provide recorded information. If the Council holds recorded information relevant to the request, it should be provided or the Council should explain why the information is exempt from disclosure and provide a proper refusal notice stating which exception is being relied upon, and details of the public interest test, as provided by regulation 14.

27. As the Commissioner considers that the correct access regime in this particular case is the EIR, regulation 12(4)(a) provides that a public authority may refuse to disclose environmental information to the extent that it does not hold that information when an applicant's request is received. Therefore, if the Council did not hold information relevant to the request at the time the request was received it should claim the exception at regulation 12(4)(a) and again issue a refusal notice in accordance with the requirements of regulation 14.
28. If any request being framed as a question means that the Council is unsure which piece of recorded information is sought by the complainant, it should treat the request as falling within regulation 9(2) a request [formulated] in too general a manner". In such cases, the Commissioner's view is that the Council should contact the applicant to clarify what piece of information is being sought. In this case, the Commissioner does not consider the request is formulated in too general a manner and believes that the Council should not need to contact the applicant to clarify the information being sought. The reason for this is that the request focuses on a particular subject matter, namely, the new contractual arrangements between the Council and Newydd Housing Association, regarding the sale of a particular piece of land. The Commissioner's view is that the Council needs to determine whether it holds any recorded information relevant to the request and provide a response in line with its obligations under the EIR.

The Decision

29. The Commissioner's decision is that the Council breached regulation 5(2) by failing to provide a response compliant with regulation 5 or regulation 14 of the EIR within twenty working days after the date of receipt of the request.

Steps Required

30. As the Commissioner has determined that the information requested, if held, would be environmental information he requires the Council to either provide the information requested or issue a valid refusal notice that complies with regulation 14 of the EIR. Unless the exception from the duty to confirm or deny under 12(5)(a) is claimed, then any refusal notice should explicitly confirm or deny whether the information is held.
31. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

32. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

33. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
34. Paragraph 1 of the Code of Practice issued under Regulation 16 of the EIR (the 'EIR Code') states:
- “All communications to a public authority, including those not in writing and those transmitted by electronic means, potentially amount to a request for information within the meaning of the EIR, and if they do they must be dealt with in accordance with the provisions of the EIR.”
35. The Commissioner is disappointed that, despite repeated attempts by the complainant to secure a response to his request and despite receiving explicit advice from the Commissioner, the Council still failed to provide a response within the terms of the EIR.
36. In addition to failing to conform to the recommendations of the paragraph 1 of the EIR Code in its handling of the request, the Council also asked the complainant to provide the reasons for submitting the request. In relation to the duty to offer advice and assistance set out under Regulation 9 of the EIR, paragraph 16 of the EIR Code states:
- “...Authorities should be aware that the aim of providing assistance is to clarify the nature of the information sought, not to determine the aims or motivation of the applicant. Care should be taken not to give the applicant the impression that he or she is obliged to disclose the nature of his or her interest or that he or she will be treated differently if he or she does...”
37. In support of its argument that the request was not valid, the Council indicated in its response to the Commissioner of 21 July 2009 that the complainant had not specified exactly what information was being sought.
38. Paragraph 16 of the EIR Code states:
- “Where the applicant does not describe the information sought in a way which would enable the public authority to identify or locate it, or the request is

ambiguous, the authority should, as far as practicable, provide assistance to the applicant to enable him or her to describe more clearly the information requested.”

Right of Appeal

39. 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 35 calendar days of the date on which this Decision Notice is served.

Dated the 21st day of September 2009

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Regulation 2(1) – Definition of environmental information

Regulation 2(1) provides that:

“In these Regulations – “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);”

Regulation 5 - Duty to make available environmental information on request

Regulation 5(1) provides that:

“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) provides that:

“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 9 - Advice and assistance

Regulation 9(1) provides that:

“A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.”

Regulation 9(2) provides that:

“Where a public authority decides that an applicant has formulated a request in too general a manner, it shall –

- (a) ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and
- (b) assist the applicant in providing those particulars.”

Regulation 9(3) provides that:

“Where a code of practice has been made under regulation 16, and to the extent that a public authority conforms to that code in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with paragraph (1) in relation to that case.”

Regulation 9(4) provides that:

“Where paragraph (2) applies, in respect of the provisions in paragraph (5), the date on which the further particulars are received by the public authority shall be treated as the date after which the period of 20 working days referred to in those provisions shall be calculated.”

Regulation 9(5) provides that:

“The provisions referred to in paragraph (4) are –

- (a) regulation 5(2);
- (b) regulation 6(2)(a); and
- (c) regulation 14(2).”

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(1) provides that:

“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.”

Regulation 12(4)(a) provides that:

“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;”

Regulation 14 - Refusal to disclose information

Regulation 14(1) provides that:

“If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.”

Regulation 14(2) provides that:

“The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.”

Regulation 14(3) provides that:

“The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).”

Regulation 14(4) provides that:

“If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.”

Regulation 14(5) provides that:

“The refusal shall inform the applicant –

- (a) that he may make representations to the public authority under regulation 11; and
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.”