

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

### **Decision Notice**

**Date: 5 July 2010**

**Public Authority:** New Forest National Park Authority  
**Address:** South Efford Houe  
Milford Road  
Lymington  
Hampshire  
SO41 0JD

### **Summary**

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On 29 June 2009, the complainant wrote to New Forest National Park Authority (NPA) with four questions about its decision not to take planning enforcement action against the complainant's neighbour. The complainant was unhappy with NPA's response to questions one and four and, following an internal review by NPA, complained to the Commissioner. During the Commissioner's investigation – and following the decision of the First Tier Tribunal (Information Rights) to dismiss the complainant's appeal against a previous Decision Notice – NPA stated that it considered the request to be manifestly unreasonable and that it should have applied the exception to disclosure provided by regulation 12(4)(b) of the EIR. The Commissioner considered it appropriate to allow the late application of the exception and agreed that the request was manifestly unreasonable and that the public interest favoured maintaining the exemption. The Commissioner found procedural breaches in the way in which NPA handled the request but requires no steps to be taken.

### **The Commissioner's Role**

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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 (the "Act") are imported into the EIR.

## Background

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3. Paragraphs two to five of the Decision Notice<sup>1</sup> served by the Commissioner on 16 September 2009 provide relevant background to this complaint, as do paragraphs two to ten of the decision of the First Tier Tribunal (Information Rights)<sup>2</sup> of 14 May 2010.

## The Request

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4. On 29 June 2009, the complainant wrote to NPA and stated that:

"Despite the expiry in January 2009 of the remaining Listed Building Consent for the voluntary rebuilding of [neighbouring property] the NFNPA has not enforced its rebuilding."

The complainant went on to ask the following four questions:

- "1. What is the NFNPA's reason for not enforcing rebuilding?
  2. Is the decision not to enforce rebuilding a permanent one?
  3. What other action does the NFNPA intend to take, and when?
  4. What are the NFNPA's criteria for enforcement and/or prosecution in general and in this particular case?"
5. NPA responded on 29 July 2009. It stated that the letter of its Chief Executive of 4 June 2009 confirmed its current position. NPA went on to say that it considered that the request fell "within the ambit of the

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<sup>1</sup>[http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fer\\_050237548\\_and\\_fer0239845.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fer_050237548_and_fer0239845.pdf)

<sup>2</sup>[http://www.informationtribunal.gov.uk/DBFiles/Decision/i390/Easter%20v%20IC%20\(0092\)%20Decision%2014-5-2010.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i390/Easter%20v%20IC%20(0092)%20Decision%2014-5-2010.pdf)

Environmental Information Regulations 2004" and the request was refused under Regulation 12(4)(a). NPA's reasoning was that to respond to the questions would require "the provision of advice, an opinion or a projection and is not information held within the Authority's records".

6. However, NPA did include the following responses to the four questions asked by the complainant. NPA's responses are in italics:

*"1. What is the NFNPA's reason for not enforcing rebuilding? The reason for not enforcing rebuilding is set out in [NPA's Chief Executive's] letter of 4 June 2009 where it was stated that as the structure was sound and reasonably weatherproof the service of an urgent works notice was not considered appropriate.*

*2. Is the decision not to enforce rebuilding a permanent one? The decision not to enforce is a current one.*

*3. What other action does the NFNPA intend to take, and when? The authority does not propose to take any further action at this stage. It cannot comment on what might occur in the future.*

*4. What are the NFNPA's criteria for enforcement and/or prosecution in general and in this particular case?" It is not possible to set out a list of criteria as these vary depending on the site concerned."*

NPA stated that it considered the matter closed and that it would not respond to further correspondence unless new issues were raised.

7. On 11 August 2009 the complainant wrote to NPA to appeal against the refusal of the information and NPA issued its findings on 8 October 2009. NPA stated that it had reviewed its application of the exception under regulation 12(4)(a) and addressed each of the four questions separately:

#### Question 1

NPA stated that the matter of enforcement action had previously been addressed in correspondence with the complainant, that the request could have been considered repeated and could have fallen under the exception provided by regulation 12(4)(b). However, NPA disclosed a file note from the enforcement file and provided further background and explanation of its reason not to take planning enforcement action against the complaint's neighbour.

### Question 2

NPA concluded that regulation 12(4)(a) had been correctly applied to this question because there was “no information recorded or held by the Authority as to whether the decision is indeed a permanent one or not”. NPA re-confirmed that the decision not to take enforcement action is a current one but, because it was unable to predict how circumstances might change in the future, was unable to clarify whether this was a permanent decision.

### Question 3

Again NPA concluded that regulation 12(4)(a) had been appropriately applied to this question because it held no information regarding its future intentions. However, NPA stated that future monitoring of the condition of the building in question would take place in the form of twice yearly site visits.

### Question 4

NPA stated that information publicly available on its website had not been disclosed – namely a document called ‘Planning Enforcement – Policy and Practice’ and it provided the complainant with a copy. NPA stated that there was no separate or specific policy document in relation to the specific case referred to by the complainant. In addition to the above policy document NPA also disclosed a file note that it said was relevant and copies of correspondence between NPA and an individual acting on the complainant’s behalf.

## **The Investigation**

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### **Scope of the case**

8. On 12 December 2009 the complainant contacted the Commissioner to complain about the way the request for information of 29 June 2009 had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - The request was not frivolous or disrespectful and is not a repeat of any earlier request.
  - The objective of the request was to obtain full and frank answers to the questions raised. Two of the four questions had been answered but the complainant was seeking answers to questions one and four.
  - The complainant was not willing to accept NPA secrecy in this matter because it helps “perpetuate the violation of [the complainant’s] rights to the full enjoyment of her home”.

- The NPA had not clarified whether it holds the requested information and if it does not, "that information can and should be assembled".
  - The request was made only after ordinary written representations failed.
  - NPA is "unfairly exercising antipathy by progressively diminishing the importance of the listed buildings" in question.
  - The complainant believes that the likely causes of "NPA secrecy in this matter include, "misinformation and improper influence by the complainant's neighbour", "unwillingness to admit not having the necessary skills and experience", and "concealment of illegal planning authorisations".
9. The complainant also provided comments on the work of a named solicitor who provided legal services for NPA and on the NPA itself.
10. The Commissioner's powers to investigate complaints are set out in section 50 of the Act (which applies equally to the EIR). The Commissioner has no remit to comment on the work undertaken by individuals on behalf of a public authority or on the work of public authorities themselves. He may only make a decision on whether a request for information has been dealt with in accordance with the relevant legislation.
11. In this case the scope of the Commissioner's investigation was limited to determining whether questions one and four of the request of 29 June 2009 had been dealt with in accordance with the legislation. The scope of the Commissioner's investigation was clarified in writing with the complainant's representative on 12 April 2010.

## **Chronology**

12. On 12 April 2010, the Commissioner emailed the complainant's representative to set out his understanding of the scope of the complaint and to ask for details of any available evidence to suggest that NPA held further relevant information at the time of the request.
13. The Commissioner received an email response from the complainant's representative on 15 April 2009. The complainant (via her representative) stated that, in her opinion, NPA should have had "an established position and rationale, to a legally-defensible standard, when it first decided to enforce the rebuilding of Listed Building that adjoined that of [the complainant] and when it later changed its mind

- and decided not to enforce that re-building". The complainant also stated that NPA should have always have had "established enforcement administration procedures and criteria" and that it "should therefore be able to say how it applied its rules in any particular case". The complainant went on to state that she considered that NPA should have no difficulty in answering the questions but that "it may be relevant that its officers lack confidence and experience, and initially worked in a culture of autocracy and secrecy. The NPA remains a tiny, autonomous body and its officers lack accountability".
14. On 19 April 2010, the Commissioner emailed NPA to clarify its position in this case and he received a response on 23 April 2010. NPA stated that it "should probably" have applied the exception provided by regulation 12(4)(b) and refused the request on the grounds that it was manifestly unreasonable. However, NPA stated that it tries to be open and transparent in its dealings with members of the public and that every effort was made to ensure that relevant information was disclosed to explain its position on enforcement.
  15. On 23 April 2010, the Commissioner telephoned NPA's solicitor to clarify whether it was now seeking to apply regulation 12(4)(b). The solicitor was unclear and the Commissioner agreed to wait until the Tribunal had promulgated its decision on the complainant's appeal against a previous Decision Notice (reference FER0237548 and FER0239845) before receiving NPA's final representations.
  16. On 28 May 2010, NPA wrote to the Commissioner and stated that in light of the Tribunal's decision it "now takes the view that question 1 and 4 [of the request of 29 June 2009] should have been dealt with as being part of the course of conduct which in light of the context and history of the matter dating back to 2006 should have been refused on the grounds that it was manifestly unreasonable under Regulation 12(4)(b) of the Environmental Information Regulations". NPA also provided its reasons for arriving at this conclusion and its consideration of the public interest test.

## Analysis

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### The relevant legislation

17. In a previous complaint to the Commissioner (reference FER0237548 and FER0239845), the complainant queried whether the EIR was the relevant legislation. It is not clear whether the complainant continues

to dispute the legislation under which NPA considered the request but the Commissioner's view remains, as stated in paragraphs 18 to 21 of Decision Notice FER0237548 and FER0239845<sup>3</sup>, that the request was appropriately considered under the EIR. This view is supported by paragraph's 33 to 39 of the Tribunal's decision EA/2009/0092<sup>4</sup>.

## Exemptions

### Regulation 12(4)(b) - the request for information is manifestly unreasonable

18. The Commissioner would generally expect a Public Authority to have established its position in relation to a request before providing its initial response to the applicant or, at the latest, following an internal review. However, in this case the Commissioner considered it appropriate to await the Tribunal's decision because the cases referred to in paragraph 15, above, related to the same fundamental issues; i.e. NPA's decision not to take planning enforcement action against the complainant's neighbour. In his case the Commissioner therefore found it reasonable that NPA would want to take into account the decision of the Tribunal when forming its final view and the Commissioner has also been mindful of that decision when arriving at his view.
19. Regulation 12(4)(b) states that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. There is no definition of the term "*manifestly unreasonable*" but the Commissioner's view is that the word "*manifestly*" implies that a request should be obviously or clearly unreasonable. There should not be any reason to doubt whether the request was in fact reasonable.
20. The Commissioner recognises similarities between section 14 of the Act and regulation 12(4)(b) of the EIR. In particular the Commissioner considers that a request that could be considered vexatious under section 14 of the Act is likely to be manifestly unreasonable for the purposes of the EIR. Additionally, given that there is no separate cost limit for responses to requests that fall under the EIR, it may be possible for some exceptionally costly requests to be considered manifestly unreasonable.

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<sup>3</sup>[http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fer\\_050237548\\_and\\_fer0239845.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fer_050237548_and_fer0239845.pdf)

<sup>4</sup>[http://www.informationtribunal.gov.uk/DBFiles/Decision/i390/Easter%20v%20IC%20\(0092\)%20Decision%2014-5-2010.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i390/Easter%20v%20IC%20(0092)%20Decision%2014-5-2010.pdf)

21. In accordance with regulation 12(1)(b), even if an exception is engaged, public authorities can only refuse to disclose the information if the public interest in maintaining the exception outweighs the public interest in disclosing the information.

### **NPA's position**

22. In this case, NPA's view is that the request of 29 June 2009 was "manifestly unreasonable, would have continued to place a disproportionate burden on the resources of NPA" and that the "balance of the public interest lay in non-disclosure since the NPA had already provided as much information as it possibly could and had offered repeated explanations for its decision not to take enforcement action".

### **The Commissioner's position**

23. The Commissioner was mindful the NPA's approach to this request may have caused confusion; i.e. in response to previous requests that the Commissioner considered under the references FER0237548 and FER0239845, NPA stated that they were manifestly unreasonable but in response to the request considered in this Notice it initially stated that it did not hold any relevant information.
24. However, despite saying that it held no relevant information, in its response to the complainant of 29 July 2009 NPA went on to address the questions posed. The findings of NPA's internal review of 8 October 2009 also offered a slightly confused approach in that it provided some further information but hinted that the request could have been considered manifestly unreasonable.
25. The Commissioner acknowledges NPA's argument that it was trying to offer the complainant as much assistance as possible but considers that the approach may have led the complainant to believe that NPA did not consider the request to be manifestly unreasonable.
26. The Commissioner was also mindful that each request should be considered on its merits and that public authorities should not assume that all requests from a particular individual will be manifestly unreasonable.
27. However, the Commissioner's view is that the request of 29 June 2009 was manifestly unreasonable and that the exception provided by regulation 12(4)(b) was engaged. The Commissioner considers that the request was an extension of the complainant's previous requests and correspondence to NPA regarding its decision not to take planning



enforcement action against the complainant's neighbour. The nature of the previous correspondence and requests is set out in the Decision Notice referred to in paragraph 18, above.

28. The Commissioner has seen no evidence to suggest that NPA has altered its position in relation to planning enforcement action in this matter and his view is that the continued submission of requests and correspondence by the complainant to NPA is an attempt to revisit a matter that has already been addressed by the public authority.
29. The Commissioner also considers the public interest in disclosure to be outweighed by the public interest in maintaining the exemption.
30. The Commissioner considers that the Decision Notice FER0237548 and FER0239845 referred to in paragraph 18, above, provides sufficient detail of his decision that NPA was correct to refuse the request on the grounds that the request was manifestly unreasonable. Given that he considers the request of 29 June 2009 to be an extension of the requests to which that Notice refers, he does not consider it necessary to set out his findings again. The Commissioner also considers that the Tribunal decision referred to in paragraph 18, above, adds weight to his decision.

### **Procedural Requirements**

31. Regulation 14 of the EIR provides that where a public authority refuses a request for information it shall, within 20 working days after the date of receipt, notify the applicant in writing. The refusal shall specify the reasons not to disclose the information requested and include any exception relied on and any matters the public authority considered under the public interest test.
32. In this case NPA relied on the exception provided by regulation 12(4)(a) in both its refusal and in the findings of its internal review and it was not until the complaint came to the Commissioner that it clarified that it was seeking to rely on the exception provided by regulation 12(4)(b). As such, NPA breached regulation 14(3)(a) and (b).

### **The Decision**

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33. 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 correctly refused the requests on the basis that regulation 12(4)(b) was engaged and that the public interest in maintaining the exemption outweighed the public interest in disclosure.

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

- By failing to specify in its refusal the relevant exception on which it relied, it breached regulation 14(3)(a) and (b).

### **Steps Required**

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34. The Commissioner requires no steps to be taken.

## Right of Appeal

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35. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://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 5th day of July 2010**

**Signed .....**

**Anne Jones  
Assistant Commissioner**

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

## Legal Annex

### **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 the 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 14 - Refusal to disclose information**

**Regulation 14(1)** 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)** 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)** 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)** 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)** 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.