

## **Freedom of Information Act 2000 (Section 50)**

### ***Environmental Information Regulations 2004***

#### **Decision Notice**

**Date: 31 March 2011**

**Public Authority:** North East Lincolnshire Council  
**Address:** Municipal Offices  
Town Hall Square  
Grimsby  
North East Lincolnshire  
DN31 1HU

#### **Summary**

---

The complainant requested from North East Lincolnshire Council (the council) a copy of the Settlement Agreement signed on 18 August 2004 between the council and Millennium Park (Grimsby) Limited. The council initially refused to disclose this document by citing sections 41 and 43(2) of the Freedom of Information Act 2000 (the Act). It said that disclosure would result in an actionable breach of confidence being made against it and would be likely to prejudice the commercial interests of some of the parties to the agreement. Subsequently, following the intervention of the Commissioner, the council also cited sections 36 and 40(2) of the Act as further reasons to refuse disclosure of the requested information. It said that disclosure of the whole agreement would prejudice the effective conduct of public affairs with the public interest test balanced against disclosure. Furthermore, it said that disclosure of the names of certain individuals referred to in the agreement would be unfair under the Data Protection Act 1998. The Commissioner finds that the information requested is environmental and therefore exempt under section 39 of the Act. Accordingly, the request should have been dealt with under the EIR. The Commissioner therefore requires the council to reconsider the request under the EIR and to either disclose the information to the complainant under Regulation 5 or issue a refusal notice under Regulation 14.

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

---

1. 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. In or about 2000 the council entered into a Development Agreement with Kestonbond Holding Limited (KB) and Millennium Park (Grimsby) Limited (MPG) for the development of the landfill site at Macualay Lane in Grimsby. At about the same time in 2000 the council, KB and P&O Developments Limited (P&OD) signed a Joint Venture Agreement in respect of the development.
3. In or about 2001 MPG failed to carry out the phased development work in accordance with the Development Agreement and the council commenced proceedings against them for breach of the agreement in the High Court.
4. Subsequently the council and KB took separate Court proceedings in the High Court against P&OD for a declaration of its obligations under the Joint Venture Agreement.
5. In 2004 all the parties (the council, Kestonbond, the Peninsular and Oriental Steam Navigation Company, MPG and P&OD) agreed to compromise both sets legal proceedings by entering into a Settlement Agreement which was signed on 18 August 2004.
6. The primary purpose of the Settlement Agreement was to ensure that MPG carried out the agreed remediation/development work on the land (including making it safe for development) within specified time scales under the supervision of the council and with the guarantee of P&OD<sup>1</sup>. This remediation work included not only the construction of an access road, roundabout and railway bridge but also the infilling of a leachate pond and the covering of waste.

---

<sup>1</sup> See the council's Statement of Accounts for 2009/10

'(iv) Macaulay Lane contaminated land – the contingent liability (as successor in title to the polluter) of in excess of £10 million is offset by a settlement agreement in which P&O guarantee to cap and contain the contaminants in situ. Given the passage of time since the original settlement agreement (6 years) and the acquisition of P&O by the Dubai World Group, discussions are ongoing with P&O to further protect the Council's position'.

<http://www.nelincs.gov.uk/council-and-democracy/council-budgets-and-spending/statement-accounts-2008-2009/>

7. Since the Settlement Agreement was signed in 2004 certain remediation work has already been carried out.

## **The Request**

---

8. On 9 June 2010 the complainant asked the council to send him pursuant to the Environmental Information Regulations 2004 and the Freedom of Information Act 2000:

*'...a copy of the "Settlement Agreement" which I am reliably informed was signed on the 18 August 2004 between North East Lincolnshire Council and Millennium Park (Grimsby) Ltd'.*

9. The council responded on 13 July 2010 confirming that it held the Settlement Agreement which it clarified was made between the council (1) Kestonbond Holdings Limited (2) the Peninsular and Oriental Steam Navigation Company (3) Millennium Park (Grimsby) Limited (4) and P&O Developments Limited (5). However, it said it was not prepared to disclose the agreement by virtue of sections 43(2) and 41 of the Act. It said that disclosure would or would be likely to prejudice the commercial interests of the Peninsular and Oriental Steam Navigation Company and its subsidiaries and of Kestonbond Holdings Limited with the public interest test being balanced against disclosure. It also said that disclosure of the agreement would give rise to an actionable breach of confidence against the council.
10. On 16 July 2010 the complainant requested an internal review as he was unhappy with the council's initial response to his information request.
11. On 9 August 2010 the council wrote to the complainant stating that having carried out an internal review it had decided to uphold its initial decision to withhold the requested information under sections 41 and 43(2) of the Act.

## **The Investigation**

---

### **Scope of the case**

12. On 16 August 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

### **Chronology**

13. On 6 October 2010 the Commissioner contacted the council and requested the withheld information within 20 working days together with

its specific arguments as to which exemptions it wished to apply to each piece of the information.

14. On 11 October 2010 the council acknowledged the Commissioner's request and requested an extension of time until 1 December in which to consult the various parties to the Settlement Agreement.
15. On 22 November 2010 the council contacted the Commissioner promising to send a copy of the Settlement Agreement through the post shortly. In the meantime it confirmed that it still wished to rely on sections 41 and 43(2) of the Act while recognising that a blanket application of these exemptions to every part of the agreement would be neither acceptable nor appropriate. However, it added that if it was to disclose a redacted version of the agreement this would prejudice the effective conduct of public affairs by prejudicing its ability to negotiate out of court settlements. Accordingly, in addition to sections 41 and 43(2) of the Act it said that would apply section 36 to the entire agreement with the public interest favouring the information being withheld. It also added that it would apply section 40(2) of the Act to the personal data of third parties named in the agreement.
16. On 30 November 2010 the council disclosed to the Commissioner a copy of the Settlement Agreement.
17. On 16 and 17 December 2010 the Commissioner contacted the council and requested details of information already in the public domain regarding the background, existence and purpose of the Settlement Agreement.
18. On 19 January 2011 the council replied to the Commissioner and confirmed that the existence and purpose of the Settlement Agreement (including the date on which it was signed and the parties to it) had been recorded in its meeting minutes and correspondence with third parties on numerous occasions since it was signed in 2004. Furthermore, it said that none of the parties to the agreement sought to deny its existence which it said was regularly referred to in dialogue with the Environment Agency. The council added that it was well known that the purpose of the agreement was to secure the remediation of the contaminated site. However, it added that what was not in the public domain and what the council objected to disclosing was the actual terms of the agreement which it said were confidential and commercially sensitive.
19. On 20 January 2011 the Commissioner wrote to the council and requested details of its minutes and correspondence in which reference was made to the Settlement Agreement and any other background information regarding its existence and implementation.

20. On 4 March 2011 the council responded to the Commissioner and alerted him to the Cabinet minutes for the 7 April 2008<sup>2</sup> and in particular Item CB. 165 which made reference to the 'Macaulay lane refuse tip remediation' which is the subject of the Settlement Agreement. Under this item the Cabinet was asked to consider 'a request to postpone the date for completion of all works required by the Settlement Agreement from July 2009 to July 2011'. It was resolved at the meeting that (amongst other things) approval should be given in principle to the postponement of the date for completion to the remediation work.

## Analysis

---

### Substantive Procedural Matters

#### Freedom of Information Act 2000 or the Environmental Information Regulations

21. The first matter for the Commissioner to decide is whether the information requested by the complainant is covered by the Act or the EIR.
22. Section 39 of the Act states that information is exempt information if the public authority holding it is obliged, by Regulations under section 74 of the Act, to make the information available to the public in accordance with those Regulations or would be so obliged but for any exemption under those Regulations. The Regulations under section 74 of the Act are the EIR. Information falls to be considered under the EIR if that information is environmental information. Environmental information is defined in Regulation 2 of the EIR.
23. A full version of Regulation 2(1) of the EIR which deals with the interpretation of the Regulations and the definition of environmental information is set out in full in the attached legal annex.
24. As mentioned in the background section of this Decision Notice the requested information is an agreement between the council and a number of other parties for the carrying out of specified remediation work to contaminated land under supervision within defined time scales. This work includes not only the construction of a road, roundabout and bridge but also the capping and containment of contaminants.

---

<sup>2</sup> <http://www.nelincs.gov.uk/meetings/committee/10/meeting/504>

25. As mentioned in the background section of this Decision Notice the requested information is an agreement between the council and a number of other parties for the carrying out of specified remediation work to contaminated land under supervision within defined time scales. This work includes not only the construction of a road, roundabout and bridge but also the capping and containment of contaminants.
26. The Commissioner is of the view that the requested information is environmental in that it is information on (i.e. concerning or about) the factor of waste affecting or likely to affect the elements of the environment, namely land and landscape. This is because part of the agreement relates to the infilling of a leachate pond and the covering of waste.
27. The Commissioner is also of the view that the requested information is environmental within the meaning of Regulation 2(1)(c) of the EIR in that it is information on (i.e. concerning or about) both a measure and an activity affecting or likely to affect the elements of the environment such as land and landscape as well as a measure or activity designed to protect those elements. The measure in this case is the contractual time table to carry out the necessary construction and remediation work and the activity is the specified work itself.
28. The Commissioner therefore concludes that the requested information is covered by the EIR.

## **The Decision**

---

29. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with Regulation 5(2) of the EIR by applying the EIR.

## **Steps Required**

---

30. The Commissioner requires the council to take the following steps to ensure compliance with the EIR.
31. The council must deal with the matter under the EIR and either disclose the requested information to the complainant in accordance with Regulation 5 or provide him with a valid refusal notice in accordance with the requirements of Regulation 14.
32. The council must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

---

33. 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.

## Right of Appeal

---

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

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

35. 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.
36. 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 31<sup>st</sup> day of March 2011**

**Signed .....**

**Andrew White  
Group Manager – Complaints Resolution  
Information Commissioner’s Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**



## Legal Annex

---

### Freedom of Information Act 2000

**Section 39(1)** provides that –

“Information is exempt information if the public authority holding it-

(a) is obliged by regulations under section 74 to make the information available to the public in accordance with the regulations, or

(b) would be so obliged but for any exemption contained in the regulations.”

**Section 39(2)** provides that –

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).”

**Section 39(3)** provides that –

“Subsection (1)(a) does not limit the generality of section 21(1).”

### Environmental Information Regulations 2004

#### Regulation 2 - Interpretation

**Regulation 2(1)** 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 –

(g) 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;

(h) 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);

- (i) 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;
- (j) reports on the implementation of environmental legislation;
- (k) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (l) 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 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.