

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

Decision Notice

Date: 23 February 2011

Public Authority: Transport for London
Address: Windsor House
42 – 50 Victoria Street
London
SW1H 0TL

Summary

The complainant requested information about achievement and management reviews of progress reports of the unit(s) carrying out compulsory purchases in relation to the Crossrail project. TfL refused to provide this information, and withheld it under section 43(2) of the Act. After investigating the case the Commissioner decided that the requested information was environmental information, as defined in regulation 2 of the EIR, and TfL should have considered this request under this legislation. Therefore TfL is required to reconsider the complainant's request under the EIR.

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 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

3. By way of background, this request was made in relation to the Crossrail project. Crossrail is a project to build a major new railway route through and under London. The Crossrail line is based around a new pair of east-west tunnels under central London connecting the Great Western Main Line near Paddington to the Great Eastern Main Line near Stratford. An eastern branch diverges at Whitechapel, running through Docklands and emerging at Custom House on a disused part of the North London Line, then under the River Thames, to Abbey Wood. Trains will run from Maidenhead and Heathrow in the west to Shenfield and Abbey Wood in the east, taking over the existing stopping services on those routes.
4. The Crossrail Act 2008 underlies this project. This Act provides for, amongst other things, the compulsory purchase of land and property for the purposes of this project.¹

The Request

5. The complainant wrote to TfL on 25 January 2010 and made the following request,
 - "- what the bonus arrangements are for those people in TfL Group Property & Facilities who have worked on Crossrail compulsory purchases,*
 - what criteria are used for awarding bonuses, the extent to which criteria have been met for any periods ending since May 2008,*
 - a schedule and total of bonuses paid (with names substituted for surveyor 1, manager 1 etc where redaction is required),*
 - any targets (whether bonus related or not) connected with work on Crossrail compulsory purchases,*
 - any documents from achievement or management reviews of reports about the progress of Crossrail compulsory purchases and the group's performance."*
6. TfL emailed the complainant on 18 February 2010 and acknowledged his request. However, it stated that it was unable to respond as it was still

¹ Further information on the Crossrail project can be found on the Department for Transport website, at <http://www.dft.gov.uk/pgr/rail/pi/crossrail/>

reviewing the relevant information. It informed him that it would respond as soon as possible.

7. The complainant initially wrote to the Commissioner on 25 February 2010 and complained that TfL had not provided a substantive response to any aspects of his request.
8. There followed an exchange of correspondence between the complainant, TfL and the Commissioner. Subsequently, on 16 September 2010 TfL wrote to the complainant and provided a substantive response. It provided some information in relation to the first, second and fourth parts of the request. In relation to the third part of the request, it refused to disclose this information, stating that it was exempt under section 40(2) of the Act. In relation to the fifth part of the request, it refused to disclose this information, stating that it was exempt under section 43(2) of the Act.

The Investigation

Scope of the case

9. As noted above, the complainant initially wrote to the Commissioner on 25 February 2010 and complained that TfL had not provided a substantive response to any aspect of his request.
10. During the course of the Commissioner's investigation the complainant confirmed that he wished to focus his complaint on the fifth part of the request (see paragraph 18 below).
11. Further to this, during the investigation TfL confirmed that it was withholding this information under section 43(2) of the Act.
12. Therefore the scope of this case is to consider TfL's use of section 43(2) to withhold the information set out in the fifth part of the complainant's request.

Chronology

13. The complainant initially wrote to the Commissioner on 25 February 2010 and complained that TfL had not provided a substantive response to any aspects of his request.
14. As noted at paragraph 8 above, following an exchange of correspondence, TfL wrote to the complainant on 16 September 2010 and informed him that it believed that the information that it held in relation to the fifth part of his request was exempt under section 43(2) of the Act.

15. The Commissioner wrote to TfL on 17 September 2010 and asked for a copy of the withheld information. He also informed TfL that the information that it held in relation to the fifth part of the request was likely to fall under the EIR. He also asked it to provide further arguments to support its use of section 43(2).
16. TfL responded on 6 October 2010 and provided the Commissioner with a sample of the withheld information. It also provided further arguments to support its use of section 43(2). It did not make any reference to the EIR.
17. The Commissioner emailed TfL on 26 October 2010 and clarified the nature of the complaint. In this email he also stated that he was of the opinion that much of the information that it held in relation to the fifth part of the request would fall under EIR.
18. In a telephone conversation and a subsequent email on 27 October 2010 the complainant informed the Commissioner that he was content to focus his complaint on TfL's handling of the fifth part of the request. He also confirmed that the fifth part of the request related to the period from May 2008 until 25 January 2010 (the date of the request).
19. On 9 November 2010 the Commissioner wrote to TfL and confirmed that the complainant was only seeking to complain about the handling of the fifth part of his request. The Commissioner also confirmed that he was only seeking access to information from May 2008 until 25 January 2010. He asked TfL to provide him with a copy of all the information that it held that fell under the scope of this request.
20. Following an exchange of correspondence, TfL wrote to the Commissioner on 21 January 2011 and provided him with a further sample of the withheld information. It also provided him with further submissions as to why it believed that this information was exempt under section 43(2) of the Act.

Analysis

Substantive Procedural Matters

Is the outstanding information environmental?

21. Regulation 2 of the EIR defines environmental information as being any information 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)."

22. The full text of regulation 2 can be found in the Legal Annex attached to the end of this notice.

23. In this instance the requested information relates to the compulsory purchase of land and property for the purposes of the construction of a major civil engineering project. Given the impact that this project will have on the environment, this information relates to a measure (as set out in regulation 2(1)(c) above) likely to affect the elements of the environment.

24. Furthermore, given the nature of the request and the potential impact of these compulsory purchases on the environment, any information held by TfL that falls under the scope of the request is environmental information.

25. Regulation 5 of the EIR places a public authority that holds environmental information under a duty to make that information available on request, unless an exception applies. The full text of regulation 5 is available in the Legal Annex attached to the end of this notice.

26. Therefore in this instance, TfL did not deal with the request for information in accordance with the EIR in that it did not apply the correct legislation when handling the request.

The Decision

27. The Commissioner's decision is that TfL did not deal with the request for information in accordance with the EIR.

Steps Required

28. The Commissioner requires TfL to take the following steps to ensure compliance with the EIR:
 - Reconsider the fifth part of the request in accordance with the EIR.
29. TfL must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

30. 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

31. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
32. 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. It is therefore essential that everyone working in a public authority who deals with correspondence, or who otherwise may be required to provide information, is familiar with the requirements of both the EIR and the EIR Code of Practice in addition to the FOIA and the other Codes of Practice issued under its provisions, and takes account of any relevant

guidance on good practice issued by the Commissioner.² Authorities should also ensure that proper training is provided.

33. The Commissioner notes that, in this instance, TfL failed to recognise and process the request under the appropriate legislation. This raises concerns that staff handling requests at TfL might not be sufficiently familiar with the requirements of the EIR. The Commissioner expects that TfL's future handling of requests will conform to the recommendations of the EIR Code.

² The 'Code of Practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004 (SI 2004 No. 3391)' is available at

<http://www.defra.gov.uk/corporate/policy/opengov/eir/pdf/cop-eir.pdf>

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: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: 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 23rd day of February 2011

Signed

**Pamela Clements
Group Manager, Complaints Resolution**

**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 –

- (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 –

- (c) government departments;
- (d) 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 –
 - 37. any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or
 - 38. any person designated by Order under section 5 of the Act;
- (e) any other body or other person, that carries out functions of public administration; or

- (f) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and –
1. has public responsibilities relating to the environment;
 2. exercises functions of a public nature relating to the environment; or
 3. 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 –

- (g) “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;
- (h) “the data protection principles”;
- (i) “data subject”; and
- (j) “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.