

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

Decision Notice

Date: 12 September 2011

Public Authority: London Borough of Tower Hamlets
Address: Town Hall
Mulberry Place
5 Clove Crescent
E14 2BG

Summary

The complainant requested information relating to a development lease granted by the public authority. The public authority withheld the relevant information on the basis of section 44(1)(a) (statutory prohibition on disclosure) of the Act and also alternatively relied on the exception at regulation 12(5)(e) of the EIR.

The Commissioner found that part of the information was environmental information. He however found both sections 44(1)(a) and regulation 12(5)(e) did not apply and further found the public authority in procedural breach of the Act and 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.

The Request

3. On 14 July 2010 the complainant requested:

'.....Copies of the minutes and clerk's notes for all Leadership Advisory Board and Senior Management Team meetings during 2007 and 2008 at which the development of the former Safeways site at 2 Gladstone Place (also referred to as Roman Place) was mentioned

.....Copies of the minutes and clerk's notes of the cabinet meetings on Wednesday 5 December 2007 and Wednesday 9 January 2008. [She added]; If any parts of these minutes or notes relate to confidential matters that are not related to the said development, please provide abridged copies with a note explaining that the omitted parts do not relate to it.'

4. On 8 September 2010 the public authority responded. It disclosed some information within the scope of the request and also informed the complainant that it did not hold the clerk's notes requested.
5. The public authority confirmed that reference was made to the former Safeway site at 2 Gladstone Place in a *'section 2 restricted minutes of the cabinet meeting held on 10 September 2008.'* The relevant information was however withheld on the basis of section 44 of the Act, although the public authority did not specify the subsection of section 44 being relied upon.
6. On 12 November 2010, following further exchanges between the complainant and the public authority, the complainant requested an internal review of the public authority's decision to withhold *'the relevant parts of the section 2 restricted minutes of the cabinet meeting held on 10 September 2008'* (hereinafter referred to as the disputed information).
7. On 26 November 2010 the public authority wrote back to the complainant with details of the outcome of the internal review. It upheld the original decision to withhold the disputed information on the basis of section 44 of the Act.

The Investigation

Scope of the case

8. On 12 January 2011 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to review the public authority's decision to withhold the disputed information.

Chronology

9. On 26 April 2011 the Commissioner wrote to the complainant. He outlined the scope of his investigation (as noted at paragraph 8 above) and requested confirmation that she was satisfied with the scope of the investigation as stated in the Commissioner's letter.
10. On 3 May 2011 the complainant confirmed that she was satisfied with the scope of the investigation.
11. On 4 May 2011 the Commissioner wrote to the public authority. In addition to requesting its submissions on the application of section 44 of the Act and copies of the disputed information, the Commissioner specifically asked the public authority to consider whether the correct information access regime for the disputed information should have been the EIR.
12. On 4 May 2011 the public authority provided the Commissioner with copies of the relevant minutes of the cabinet meeting including a report.
13. On 5 May 2011 the Commissioner wrote back to the public authority. In view of the wording of the internal review request (i.e. for 'relevant parts of the section 2 restricted minutes...'), he asked the public authority to specify the disputed information, in other words, the relevant information within the scope of the request.
14. On 13 June 2011 the public authority responded and specified the disputed information. It further submitted that if the Commissioner considered the disputed information exempt under the EIR, then it would seek to rely on the exception at regulation 12(5)(e).
15. On 28 June 2011 the Commissioner asked the public authority to provide him with a copy of the tabled questions and comments by the Overview and Scrutiny Committee referred to in item 15.1 of the minutes of the cabinet meeting of September 2008. The Commissioner explained that in his opinion, the relevant information was also part of the disputed information. The Commissioner also requested the public

authority's detailed submissions on the exception at regulation 12(5)(e).

16. On 25 July 2011 the public authority responded. It provided the Commissioner with a copy of a question tabled by the Overview and Scrutiny Committee at the meeting of September 2008. It also made representations on the application of regulation 12(5)(e).
17. On 4 August 2011 the Commissioner asked the public authority to confirm that the information provided on 25 July was the only question tabled by the Overview and Scrutiny Committee at the cabinet meeting of September 2008.
18. On 19 August 2011 the public authority responded. It confirmed that was the only question on the sheet tabled by the Overview and Scrutiny Committee.

Analysis

Substantive Procedural Matters

19. A full text of all the statutory provisions referred to below can be found in the legal annex.

Applicable Access Regime

20. The Commissioner first considered whether the disputed information is 'environmental' within the definition in the EIR.
21. The public authority submitted that the request was correctly handled under the Act because the disputed information '[was about] *a development transaction and the condition under the Local Government Act 2000 related to it being a commercial issue.*' It subsequently clarified that the request was handled under the Act because the disputed information '*relates to a commercial transaction concerning a lease...*'

Commissioner's Assessment

Disputed Information

22. The Commissioner understands the disputed information consists of:
 - A Report by the Corporate Director, Development & Renewal – 10 September 2008,

- The Minutes of the Cabinet meeting of 10 September 2008 excluding item 17.1 which the public authority did not consider fell within the scope of the request, and
 - A question by the Overview and Scrutiny Committee – 10 September 2008.
23. 'Environmental Information' is defined at regulation 2(1) of the EIR as 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);
24. In the Commissioner's opinion, the phrase 'any information....on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. The Commissioner considers a broad interpretation of this phrase will usually include information concerning, about, or relating to the measure, activity, factor etc in question. In other words, information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in

environmental decision making is likely to be environmental information.

25. In the Commissioner's opinion, if information can be easily divided between environmental information and other information then it should be considered in parts to decide which information is caught by the EIR and which by the Act.
26. The Commissioner finds that the following parts of the withheld information constitute environmental information:
 - A Report by the Corporate Director, Development & Renewal – 10 September 2008 – entire document.
 - The Minutes of the Cabinet meeting of 10 September 2008 (excluding item 17.1 which the public authority did not consider fell within the scope of the request) – item 2, item 15.1 (third paragraph), item 17.2.
 - A question by the Overview and Scrutiny Committee – 10 September 2008 – entire document.
27. In the Commissioner's opinion, the information identified above relates to plans and activities likely to affect the elements and factors referred to in regulations 2(1) (a) and (b) of the EIR. In broad terms, this information covers agreed proposals and funding regarding constructions and structural developments on the Roman Place site. Although some of this information does not explicitly relate to the elements and factors referred to above it does inform the overall decision making process in relation to the development. This information is therefore integral to the development, the outcome of which would be likely to affect the elements and factors in regulations 2(1) (a) and (b). As noted above, the Commissioner considers that 'any information on.....' should be interpreted widely and he is therefore not persuaded by the public authority's argument that the information is not environmental because it relates to a commercial transaction concerning a development lease.
28. The Commissioner therefore finds that the information in paragraph 26 above is environmental information by virtue of regulation 2(1)(c).
29. In terms of the non-environmental information, the Commissioner considers that it is not linked to the state of the elements and the factors described in regulation 2(1) (a) and (b) of the EIR. This information is not integral to the development and would not inform aspects of the decision making process which would be likely to affect the environment.

30. The Commissioner first considered whether the non-environmental information was correctly withheld on the basis of section 44 of the Act.

Exemption

Section 44

31. The Commissioner understands the public authority specifically relied on the exemption at section 44(1)(a) of the Act.
32. Information is exempt on the basis of section 44(1)(a) if its disclosure by the public authority holding it is prohibited by or under any enactment.
33. According to the public authority, paragraph 3 of part 1 of Schedule 12A of the Local Government Act 1972 (the LGA) grants it the power to restrict the disclosure of information in limited circumstances. It explained that the Assistant Chief Executive is the designated 'proper officer' for taking the decision to exclude information from minutes of cabinet meetings.
34. Sections 100B (1) and (2) of the LGA provide:

Access to agenda and connected reports.

(1)Copies of the agenda for a meeting of a principal council and, subject to subsection (2) below, copies of any report for the meeting shall be open to inspection by members of the public at the offices of the council in accordance with subsection (3) below.

(2)If the proper officer thinks fit, there may be excluded from the copies of reports provided in pursuance of subsection (1) above the whole of any report which, or any part which, relates only to items during which, in his opinion, the meeting is likely not to be open to the public.

35. Section 100B(5) further provides:

Where by virtue of subsection (2) above the whole or any part of a report for a meeting is not open to inspection by the public under subsection (1) above—

(a)every copy of the report or of the part shall be marked "Not for publication"; and

(b)there shall be stated on every copy of the whole or any part of the report the description, in terms of Schedule 12A to this Act, of the exempt information by virtue of which the council are likely to exclude the public during the item to which the report relates.

36. The public authority informed the Commissioner that the information at the meeting was, as described by schedule 12A(3):

Information relating to the financial or business affairs of any particular person(including the authority holding that information).

37. For section 44(1)(a) to apply, it is clear that the relevant information must be prohibited from disclosure by another enactment, effectively a statutory bar from disclosure.
38. In the Commissioner's opinion, the combined provisions of sections 100B (1), (2), (5), and schedule 12A (3) of the LGA do not impose a statutory prohibition from disclosure on the public authority. They instead grant the public authority the discretion to exclude from publication, information from minutes of its meetings which fit any of the descriptions in schedule 12A. This exclusion from publication provided for by the LGA is therefore not the same as exemption (or prohibition) from disclosure under the FOI Act in response to a request for information made under it. As such this provision of the LGA cannot form the basis of the claim to section 44(1)(a).
39. The Commissioner finds that the public authority incorrectly withheld the disputed information (other than the information described in paragraph 26 above) on the basis of the exemption at section 44(1)(a) by virtue of paragraph 3, part 1 of schedule 12A of the LGA.

Exception

40. The Commissioner next considered whether the disputed environmental information was correctly withheld on the basis of the exception at regulation 12(5)(e).
41. Paragraph 26 details the disputed information which the Commissioner considers to be environmental.

Regulation 12(5)(e)

42. Information is exempt on the basis of regulation 12(5)(e) if its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
43. The Commissioner considers that this exception can be broken down into the following tests, all of which are required to be met in order for the exception to be engaged:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

44. The Commissioner is satisfied that the disputed information is commercial in nature. The information relates to the proposals and funding arrangements in a development lease agreement for the Roman Place site.

Is the information subject to confidentiality provided by law?

45. The public authority explained that it considered the information exempt under schedule 12A(3) of the LGA and this was its basis for relying on regulation 12(5)(e).

46. The Commissioner has already found that schedule 12A does not provide an exemption from disclosure. Therefore, for the same reasons he found section 44(1)(a) not exempt, he finds that the disputed information is not subject to a confidentiality provided by law on the basis of the combined provisions of sections 100B (1), (2), (5), and schedule 12A(e) of the LGA.

47. The Commissioner therefore finds that the public authority incorrectly withheld the disputed information described in paragraph 41 above on the basis of regulation 12(5)(e) of the EIR.

48. In view of the above decision, the Commissioner did not go on to conduct a public interest test.

Procedural Requirements

49. By virtue of section 17(1), a public authority is required to issue a refusal notice within 20 working days.

50. The Commissioner finds the public authority in breach of section 17(1) for issuing its refusal notice of 8 September 2010 outside the statutory time limit.

51. By virtue of section 17(1)(b) a public authority is required to specify the exemption it has relied on in its refusal notice.

52. The Commissioner finds the public authority in breach of section 17(1)(b) for not specifying in its refusal notice that it withheld the disputed information on the basis of section 44(1)(a).
53. Sections 1(1)(b) and 10(1) combine to impose on a public authority a duty to disclose information within 20 working days of a request.
54. The Commissioner finds the public authority in breach of sections 1(1)(b) and 10(1) for failing to disclose the disputed information (other than the information described in paragraph 4 above) within 20 working days.
55. By virtue of regulations 14(1) and 14(2) a public authority is required to issue a refusal notice under the EIR within 20 working days.
56. The Commissioner finds the public authority in breach of regulations 14(1) and 14(2) for the late reliance on the exception at regulation 12(5)(e).
57. By virtue of regulations 14(3) (a) and (b) the refusal notice (issued at the time of the request) must specify the exceptions relied on to refuse the request and the matters the public authority considered in reaching its decision with respect to the public interest.
58. The Commissioner finds the public authority in breach of regulations 14(3) (a) and (b) for failing to rely on the exception at regulation 12(5)(e) at the time of the request.
59. Regulations 5 (1) and (2) combine to impose a duty on a public authority to disclose information within 20 working days following a request.
60. The Commissioner finds the public authority in breach of regulations 5(1) and 5(2) for failing to disclose the environmental information (described at paragraph 40 above) within 20 working days.

The Decision

61. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act and the EIR.

Steps Required

62. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Disclose all of the disputed information.
63. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

64. 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

65. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

66. 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.
67. 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 12th day of September 2011

Signed

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

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Refusal of Request

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

Prohibitions on disclosure

Section 44(1) provides that –

"Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court."

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 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 –

- (d) any exception relied on under regulations 12(4), 12(5) or 13; and
- (e) 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 –

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