

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

Decision Notice

Date: 21 September 2011

Public Authority: Northumberland County Council
Address: County Hall
Morpeth
Northumberland
NE61 2EF

Summary

The complainant made a request for information to Northumberland County Council ("the council") relating to proposals to install bus stops. The request contained a number of points. In relation to point 1 of the request, the council said that it could neither confirm nor deny whether the information was held and it cited the exemption under section 41 of the Freedom of Information Act 2000 ("the FOIA"). In relation to points 1.1, 2 and 2.1 of the request, the council said that it did not hold the information. In relation to points 3 to 3.4 and 4, the council provided a written response. The Commissioner investigated and decided that the request should have been handled under the Environmental Information Regulations 2004 ("the EIR") rather than the FOIA. The Commissioner found that the authority had breached regulation 14(2) and 14(3)(a) of the EIR but that it had otherwise complied with its obligations under the EIR. He requires no steps to be taken.

The Commissioner's Role

1. The 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 FOIA are imported into the EIR.

The Request

2. On 7 December 2010, the complainant requested information from the council in the following terms:

"Freedom of Information Act Enquiry Re Bus Stop Proposal 242 Western Way NE20 9ND and subsidised bus services through Darras hall.

Please let me have the following information

1) The number of passengers (weekly, monthly or annually) who travel on the Western Way, section of publicly subsidised bus services.

1.1) The number of such bus passengers who have expressed a need to board and/or alight from a bus in the vicinity of 242 Western Way.

2. The method of collection of any available [sic] evidence that there is a need for a bus stop in the vicinity of 242 Western Way.

2.1) The date(s) when any such evidence was collected.

3. When was any evidence of need for a bus stop in the vicinity of 242 Western Way made available to:

3.1 Ian Jopling

3.2 Margaret Field

3.3 Ponteland Town Council; and/or

3.4 Residents of Darras Hall who were consulted regarding the 242 Western Way Bus Stop proposal.

4. Is the Go North East document 'Bus Stop requirements for Darras Hall Services 74/74A Northumberland CC area' (on which Ponteland Town Council relied in its decision to support a bus stop proposal in a Highways Working Party meeting on 5 May 2009) accurate in stating that no bus stops 'exist on Edge Hill or Western Way...' Darras Hall".

3. The council replied on 6 January 2011. In relation to point 1, the council said that it could neither confirm nor deny whether the information was held. It cited the exemption under section 41 of the FOIA. In relation to point 1.1, 2 and 2.1, the council said that it did not hold the information and it suggested that the complainant contacts Go Ahead North East for the information. In relation to points 3 to 3.4 and 4, the council provided a written response.
4. The complainant wrote to request an internal review on 4 April 2011.

5. The council completed its internal review on 21 April 2011. It said that it believed it had dealt with the request appropriately.

The Investigation

Scope of the case

6. On 16 March 2011, the Commissioner received a complaint from the complainant. Having reviewed the correspondence received from the complainant, the Commissioner considered that the precise nature of the complaint was not clear. It was not, for example, apparent whether the complainant wished to complain about the response received in respect of all the points in his request or only some of them. The Commissioner therefore invited the complainant to identify which points he wished to complain about and to explain why he considered that the matter had not been appropriately handled. The complainant provided a specific complaint in relation to all the individual points that were made on 7 December 2010 as follows:

- Point 1 – The complainant believes that this information is held by the council and it is not exempt under section 41 of the FOIA
- Point 1.1 – The complainant alleged that the council had failed to comply with section 16 of the FOIA
- Point 2 – The complainant alleged that the council had failed to comply with section 16 of the FOIA
- Point 2.1 - The complainant alleged that the council had failed to comply with section 16 of the FOIA
- Point 3 to 3.4 – The complainant alleged that the council had not supplied the information he requested
- Point 4 – The complainant alleged that the council had not supplied the information he requested

Chronology

7. Between 13 May 2011 and 18 August 2011 the Commissioner exchanged correspondence with the parties to further his enquiries and clarify the nature of the complaint.

Analysis

Substantive Procedural Matters

Is the information environmental?

8. Regulation 2(1)(c) of the EIR provides that any information on plans or activities affecting or likely to affect the elements of the environment will be “environmental information”. Environmental information must be considered under the EIR rather than the FOIA. Having considered the complainant’s request, the Commissioner decided that it should have been considered under the EIR as the information relates to plans to install new bus stop infrastructure. These proposals are likely to affect the elements and factors set out in regulation 2. In particular, the proposals are likely to affect the land and generate more noise in a particular area.

Exception – Regulation 12(4)(a)

Did the council hold the information requested at points 1, 3 to 3.4 and 4?

9. Regulation 12(4)(a) provides an exception to the duty to disclose information under regulation 5(1) if the requested information was not held at the time of the request. In circumstances where there is a dispute over the extent of the recorded information that was held by a public authority, the Commissioner will consider the matter “on the balance of probabilities”. This includes consideration of what the authority has done to check that it did not hold the requested information and any explanation, where appropriate, relating to why the information was not held.

Point 1

10. When the council initially responded to point 1, it said that it could neither confirm nor deny whether the information was held and it cited the exemption under section 41. When the Commissioner asked the council to review its response, the council then applied regulation 12(4)(a) of the EIR which should be applied in cases when information was not held at the time of a request. In an apparent contradiction, it also applied regulation 12(5)(e) and 12(5)(f).
11. The Commissioner discussed the contradictory response provided above with the council during a telephone conversation. The council explained that having reviewed the matter, it realised that it should have said that it did not hold the information being requested. It explained that the only data held by the council is the total monthly

passenger numbers by ticket type for the whole of the service 74/74A route. This information is provided to it by the bus operator of the services that the council financially supports. The Commissioner notes that this is not the information requested by the complainant as the complainant has asked for information on passenger numbers for a particular section.

12. The council explained that it had conducted relevant searches to check that no further information was held, including consulting relevant members of staff. It said that it had not been necessary for the bus operator to provide the information requested by the complainant as the local bus operator was considered to be best informed about the where passengers would benefit from additional bus stops. In view of the response provided by the council, the Commissioner accepts that on the balance of probabilities, the requested information was not held. It confirmed that it had never held any relevant information that had been deleted, destroyed or mislaid.

Points 3 to 3.4

13. When the council initially responded to these points, it provided dates relating to the first three points and in relation to the last one, it said that the residents of Darras Hall were consulted on 9 July 2009. It said that they had been told that the bus operator had requested new bus stops and appropriate comments were sought.
14. When the Commissioner asked the complainant to explain why he was dissatisfied with the response, the complainant said that he disputes that this represented the recorded information he had requested. The complainant said that he had asked about when evidence of *need* for a bus stop was provided to the particular people and groups referred to. He said that the council's response refers to evidence of a consultation which is not the same as evidence of need.
15. The council explained to the Commissioner that the only recorded "evidence of need" it relied upon was the formal request from Go Ahead North East in which they expressed the need for the bus stops at the location. It said that it considered that the bus operator was best placed to make that recommendation. It said it had provided the dates when that request was brought to the attention of the people and groups concerned. The council explained that it had some verbal discussions prior to the bus operator's formal request but the details of those discussions had not been recorded. The council explained that it had conducted searches to check that no further information was held including relevant electronic and paper records. It said that it had searched records of correspondence between itself and county councillors, Ponteland Town Council, local bus operators and local

residents. It said that although it had identified that it held information relating to requests to provide additional bus stops in general across Darras Hall, it did not hold any further recorded information regarding evidence of need for a bus stop in the vicinity of 242 Western Way. The council also confirmed that it was not aware that it had ever held any relevant information that had been deleted, destroyed or mislaid.

16. The Commissioner understands that from the complainant's point of view, a request for additional bus stops is not the same as evidence of need. However, although the Commissioner appreciates that the complainant would have expected the council to have relied upon more detailed recorded evidence, the Commissioner accepts that on the balance of probabilities, the only recorded evidence it relied upon was the formal request from the bus operator and therefore there was no other recorded information that it could have provided to the complainant in response to this particular request.

Point 4

17. In its initial response to point 4, the council said that the document referred to by the complainant is concerned only with the Go North East Service 74/74A. The statement "whilst a number of bus stops exist on Darras Road, Middle Drive and Woodside, none exist on Eastern Way, Edge Hill or Western Way..." is accurate in relation to Service 74/74A.
18. When the Commissioner asked the complainant to explain why he was dissatisfied with the response, he said that the council had merely asserted, negligently in his view, that the previous inaccurate correspondence was accurate. He said that the council had failed to provide the records it held regarding the "whereabouts of then extant bus stops in the area referred to".
19. The council confirmed to the Commissioner that it used recorded information to answer the question. It said that it referred to the council's Geographical Information System (GIS) which displays the location of all bus stops in Darras Hall and a plan showing the route of the registered bus service 74/74A as supplied to the Traffic Commissioner by Go-Ahead. It also said that it had double-checked the accuracy of this information by visiting the area.
20. In view of the above, the Commissioner was satisfied that on the balance of probabilities, the complainant had been provided with the recorded information that was held by the council that fell within the scope of the request. The Commissioner does not agree with the complainant's belief that the authority should have provided him with all the records it held regarding the "whereabouts of then extant bus

stops in the area referred to". His request was clearly limited to asking the council to confirm the accuracy of a statement in a particular document, which the council has done using the recorded information it held. The obligation upon the authority is to provide information, not documents, and it is only obliged to consider information that was asked for. To the extent that the complainant wishes to contest the accuracy of the information that is held or the accuracy of the statement in the document he has seen, that particular issue does not fall within the remit of the Commissioner's Office.

Regulation 9 – advice and assistance

21. In relation to points 1.1, 2 and 2.1, the complainant alleged that there had been a breach of section 16(1) of the FOIA. This breach relates to the public authority's obligations to provide reasonable advice and assistance. As the Commissioner has found that the request should have been considered under the terms of the EIR, there can be no breach of the FOIA. However, the Commissioner considered that it was appropriate to consider the most similar breach under the EIR in accordance with regulation 9.
22. Regulation 9 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. The provision of advice and assistance is covered in part III of the regulation 16 code of practice under paragraphs 8 to 23. The code of practice is called "Code of Practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004" (SI 2004 No. 3391) and it was issued in February 2005.
23. The complainant alleged that there had been a breach of the council's duty to provide reasonable advice and assistance but he did not explain to the Commissioner why he believed there had been a breach of this duty. Having considered the response, it was not apparent to the Commissioner that the council failed to provide any advice and assistance that it would have been reasonable to expect it to provide. The Commissioner has therefore not found any breach of regulation 9 of the EIR in this case.

Procedural Requirements

24. The Commissioner considers that the council breached regulation 14(2) and 14(3)(a) of the EIR for failing to cite the exception under regulation 12(4)(a) in relation to point 1, 1.1, 2 and 2.1 of the request within 20 working days or by the date of its internal review.

The Decision

25. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the EIR:

- It did not breach its obligations under the EIR by failing to provide the requested information because it did not hold the information requested in point 1.
- It did not breach its obligations under the EIR to provide recorded information in relation to points 3 to 3.4 and 4 because it had provided the recorded information that it held and it did not hold any additional recorded information falling within the scope of the requests.
- It did not breach its obligation to provide reasonable advice and assistance under regulation 9 in relation to points 1.1, 2 and 2.1.

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

- The council breached regulation 14(2) and regulation 14(3)(a) for not citing regulation 12(4)(a) in relation to point 1, 1.1, 2 and 2.1 within 20 working days or by the date of its internal review.

Steps Required

27. The Commissioner requires no steps to be taken.

Right of Appeal

28. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

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

Website: www.informationtribunal.gov.uk

29. 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.
30. 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 21st day of September 2011

Signed

**Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex – 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 –

- (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;

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 9 - Advice and assistance

Regulation 9(1) 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(3) 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 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(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;

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 –

- (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 –
 1. was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 2. did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 3. has not consented to its disclosure

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).