

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 9 May 2013

Public Authority: Cumbria County Council
Address: Headquarters
The Courts
Carlisle
Cumbria
CA3 8NA

Decision (including any steps ordered)

1. The complainant has requested information which was considered by Cumbria County Council's (the council) legal advisor in preparing the council's Acknowledgment of Service to the legal proceedings he had brought against the council in relation to the citing of a market. The council initially withheld the information as it considered that it was subject to legal professional privilege, and was therefore excepted from disclosure under regulation 12(5)(b). However, during the course of the Commissioner's investigation, it determined that only a small amount of information fell within the scope of the request and this was disclosed to the complainant.
2. The Commissioner's decision is that the council has made available all the information falling within the scope of the complainant's request in accordance with regulation 5(1). However, he finds that the council's response to the request was provided outside the prescribed 20 working days, and he has therefore recorded a breach of regulation 5(2).
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 24 April 2012, the complainant wrote to the council and requested information in the following terms:

"Each and every document (if any) which was before [named council officer] when she composed your Council's Acknowledgment of Service in my previous proceedings and which provided any evidence that any Saturday market had been established or permitted or authorised in Market Place."

5. Following the Commissioner's involvement in the case, the council responded on 15 November 2012. It stated that the requested information was protected by legal professional privilege and could not be disclosed.
6. Following an internal review the council wrote to the complainant on 29 November 2012. It stated that it was relying on regulation 12(5)(b) and having balanced the public interest, it maintained that the information was excepted from disclosure.

Scope of the case

7. The complainant contacted the Commissioner on 1 January 2013 to complain about the way his request for information had been handled. He stated that he disagreed with the council's decision to deal with the request under the EIR. He also considered that the public interest favoured disclosing the information.
8. Following the council's response to the complainant during the investigation which provided a copy of the small amount of information it now considered to be all it held within the scope of the request, the complainant contacted the Commissioner to dispute this.
9. The Commissioner therefore considers the scope of this investigation to be to determine whether the EIR is the correct regime to consider the request under, and consequently, whether the council has identified all the information falling within the scope of the request.

Reasons for decision

Regulation 2

10. Regulation 2(1) of the EIR provides the following definition of environmental information –

"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;”*

11. The complainant has argued that regulation 2(1)(a) is only concerned with the state of the elements in their natural condition. He considers that Market Place in Cockermouth is a paved highway, and consequently is neither “land” nor “landscape”. Further to this, he has argued that a market is a legal right rather than having a physical existence, and is therefore incapable of being a factor within regulation 2(1)(b). Finally, he considers that the information he has requested was that put before the council’s barrister, and as such, whilst it may have affected the Acknowledgement of Service, it did not have the capacity to affect any element or factor and so regulation 2(1)(c) cannot apply either.
12. The Commissioner accepts that the request is solely for the information considered by the council’s barrister in her preparation of the Acknowledgement of Service in relation to the legal proceedings against the council. However, he considers that the legal proceedings and consequently the information before the barrister, was information about a market held in Market Place, Cockermouth. A market is, in the Commissioner’s view, an activity that is likely to affect at least one of the elements and factors listed in regulation 2(1)(a) and 2(1)(b). In particular he considers that the market is likely to affect the land and landscape, he does not accept that “land” and “landscape” must necessarily be in their natural condition for them to fall within the definition.
13. The Commissioner therefore considers that the request for information relating to the holding of the market is a request for information on an activity likely to affect the environment. As such, the request falls under the scope of regulation 2(1)(c) and may be described as a request for “environmental information”. The Commissioner therefore accepts that

the council is correct to deal with the request under the EIR rather than the FOIA.

Regulation 5(1) – Information held

14. Regulation 5(1) of the EIR provides a general right of access to request recorded information held by public authorities which meets the definition of “environmental information” provided by regulation 2(1).
15. It is clear that only information which falls within the scope of a request can be considered to have been requested. Therefore the obligation placed on a public authority to provide environmental information on request can only extend to the actual information that has been requested.
16. In this case, the council initially identified a number of emails and attachments as falling within the scope of the request, and it withheld this information as it considered that it was covered by a claim of legal professional privilege. The Commissioner therefore began his investigation by viewing the withheld information and considering the extent to which it was covered by the exception at regulation 12(5)(b). In providing the Commissioner with the withheld information for his investigation, the council informed him that it had reconsidered the scope of the complainant’s request and now found that only a very small amount of information was caught.
17. The council explained that previously it had considered the scope of the complainant’s request to be for all information considered by its barrister in her preparation of an Acknowledgment of Service. However, in reconsidering the request for the Commissioner’s investigation, it noted that it the second part of the request; “...*and which provided any evidence that any Saturday market had been established or permitted or authorised in Market Place.*” had the effect of limiting the information requested to that which was considered by the barrister *and* which provided evidence of a Saturday market being established, permitted or authorised in Market Place.
18. The Commissioner has reviewed the information which the council initially considered fell within the scope of the request and accepts that the small amount of information which has now been provided to the complainant is the only information which provides evidence of a Saturday market being established, permitted or authorised in Market Place.
19. The Commissioner therefore finds that the additional information which the council initially identified was outside the scope of the request. His

decision is that the council has provided the complainant with all of the information it holds falling within the scope of the request.

Regulation 5(2) – Time for response

20. Regulation 5(2) states that this information shall be made available as soon as possible and no later than 20 working days after the date of receipt of request.
21. The complainant submitted his request for information on 24 April 2012, and the council did not provide a response until 15 November 2012, after the Commissioner had reminded it of its obligations under the EIR. In addition to this, the information falling within the scope of the request was not provided to the complainant until 11 March 2013.
22. Consequently, the Commissioner finds that the council breached regulation 5(2).

Right of appeal

23. 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@hmcts.gsi.gov.uk

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

24. 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.
25. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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