

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

Date: 01 August 2013

Public Authority: North York Moors National Park Authority
Address: The Old Vicarage
Bondgate
Helmsley
York
YO62 5BP

Decision (including any steps ordered)

1. The complainant requested information held by the North York Moors National Park Authority (the 'NYMNPA') relating to the scheduling of an area of his land as an ancient monument by English Heritage (EH). 12 acres of his land were scheduled for ancient monument protection. After an appeal which took a number of years he was successful in arranging for the area scheduled to be reduced to 2-3 acres.
2. The complainant believes that information provided to EH by other public authorities which had responsibility for the national park prior to the NYMNPA (the county council or the National Park Committee) was responsible for the larger area of his land being scheduled. He requested information from the NYMNPA as he believes that it holds information relating to that.
3. The complainant had asked the NYMNPA for a copy of a sketch plot map to aid his appeal for a number of years but was told that this was not held. However this was found by the authority shortly after his appeal against the area scheduled was successful. It was then disclosed to him.
4. The complainant also asked for other information from the authority such as letters or emails from EH and notes taken by its officers of telephone conversations with him. The NYMNPA provided some

information but said that it did not hold other information. The complainant believes that further information is held.

5. The Commissioner has considered the authority's response and is satisfied that on a balance of probabilities no further information is held.
6. He has decided however that the NYMNPA breached Regulation 5(2) as it did not disclose all of the information which it held falling within the scope of the complainant's request within 20 working days.
7. The Commissioner's decision is therefore that the NYMNPA has not complied with the requirements of the Regulations.
8. However the Commissioner does not require the public authority to take any steps.

Request and response

9. The complainant argues that he requested a copy of a sketch plot map from the authority for a number of years, and that the NYMNPA had always stated that it did not hold that information. A copy was however disclosed to him 2 months after the appeal decision went in his favour. There is no record of these requests as the complainant states they were made verbally. The NYMNPA considered his complaint about this and partially upheld it. It explained however that it had not known that one of its officers held a copy of the map which he held due to his previous job at the county council as its archaeologist.
10. As regards the further information the NYMNPA states that it has no record of any verbal requests being made until 12 August 2012. It states however that it receives many verbal requests for information and that it treats the majority of these as day to day requests.
11. On 12 March 2012 the complainant also requested the following:

"Copies of all documents – letters- faxes – emails- notes – memos – notes of telephone conversations – internal notes etc etc including closed files – archived material – maps –databases etc etc including all contact material to and from ADAS & English Heritage and NYCC etc. Some of the material requested will be from the NYCC files regarding the scheduled area and the legal aspects of the section 39 agreement. All recorded information held by the NYMP and NYCC is I am informed within the scope of the FOI Act and E.I. regulations and nothing should be withheld; unless it comes within the exemptions and exceptions rules."

12. This was responded to by the NYMNPA on 17 April 2012. It stated that it was providing all documents which it had been able to find, and that no information was being withheld.
13. The complainant wrote to the NYMNPA on 21 April 2012 specifying other information which he had expected to receive from the NYMNPA. Some of this information was provided.
 - *"Copies of the notes of my [the complainant's] phone conversations with the Senior Archaeological Conservation Officer."*

The complainant says that these were not disclosed to him.

- *"Copies of the paperwork posted to EH and referred to in the email of 21 January 2010."*

The complainant says that this was not disclosed completely.

- *"Copies of the notes of my phone conversations with the Archaeological Conservation Officer. These were also requests for information and clarification of points raised in EH letters."*

The complainant says that this was not disclosed to him.

- *"Copy of the email (?) from EH which prompted that Officer to send the email dated 15 November 2007 and also copies of the notes of the site visits referred to in that email."*

The complainant says that this was not disclosed to him.

14. In a separate undated letter the complainant also outlined the aims and questions which he wanted answered by the authority:
 - *"Why did the NP keep refusing to release that vital information showing the position of the identified remains within the scheduled area. It was only released after the secretary of state had de-scheduled the disputed part of the field.*

What part if any did NP play in providing information for the "criminal offence" letter sent to me by EH.

Why is the NP refusing to clearly clarify the SMC issue raised in that "criminal offence" letter, and why did the NP not destroy it when requested to do so by EH.

Why did the NP release personal information from the WCA to a third party without my permission (EH have confirmed that they

saw more than two maps).

How did the NP get hold of a copy of the discredited letter from EH to myself (26 January 2012) and what part if any did the NP play in providing information for this letter.

I still believe that the authority is withholding further information from me; mainly internal notes of telephone conversations and emails however there are some documents and notes that I can be more specific about they are:-

- *letter dated 1 May 2011 re SMC issue (the complainant says that this has now been disclosed)*
- *copy of email NP to EH re missing scale plot and copy of EH reply (now disclosed)*
- *Notes of 2 February 2012 confirming the plan was compiled from aerial photographic and excavation evidence in the 1980's (the complainant states that this has still not been disclosed to him).*

15. On 1 October 2012 the authority's chief executive wrote to the complainant stating that it had provided all of the information which it held to him. He stated that no information was being withheld under exemptions or exceptions. The complainant however states that he believes further information is held. The council's chief executive also held a meeting with the complainant in order to reassure him that no further information is held.

Scope of the case

16. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He asked the Commissioner to consider whether further information is held and whether the NYMNPA had withheld information from him over a number of years in order to protect its position and/or the actions of some of its officers. He also asked the Commissioner to consider how the NYMNPA had ignored verbal requests made by him in the past.
17. The Commissioner considers the complaint is therefore whether further information is held by the authority, and if so whether that information should be disclosed to him or not. It is also a request for the Commissioner to consider how the NYMNPA has handled his requests overall given that information it said that it did not hold was subsequently found and disclosed to him.

18. It is important to note that the complainant owns the land in question and therefore some of this information may have been exempted from disclosure under The Data Protection Act 1998 (the 'DPA'). The NYMNPA has however not sought to apply Regulation 5(3) to the information (information which is the personal data of the applicant). The Commissioner has therefore considered the case under the Regulations however he recognises that some personal data could be withheld in the event that further requests are made by third parties for some of the information concerned under the non-disclosure provisions of the DPA.

Reasons for decision

Background

19. The background to this case goes back to 1985 when archaeological remains were discovered in one part of the complainant's field. Initial excavations were carried out and a decision made to schedule the whole field by EH. The public authorities responsible for supporting work at that time were the National Park Committee and the county council. The complainant considers that it was work carried out by, and information provided by the county council to EH which resulted in the larger area of land being scheduled.
20. At the time that the land was scheduled officers who now work for the NYMNPA were working for the county council or the National Park Committee. In particular, one officer now working for the NYMNPA was that that time the county council's archaeologist.
21. Although the area being scheduled was disputed by the complainant at that time EH scheduled the entire field and the complainant entered into a management agreement with the National Park Committee setting out restrictions on activities he could carry out on the land and presumably a compensation deal for loss of the use of the land.
22. It appears from the evidence presented to the Commissioner that the initial intention of both parties was for the period of this agreement to be 21 Years. This was the period initially stipulated in the draft agreement and the Committee's annual report stated at that time that the period of the one management agreement entered into that year was 21 years. However in actual fact the period on the agreement signed by the complainant specifies a period of 16 years only. The complainant says that he signed the agreement for 16 years after raising the discrepancy with an officer at the National Park Committee. He says that he was told by the officer that this was an error, that the period was in fact 21 years and he should not worry about it and sign the agreement. Over time any evidence of this verbal reassurance has

however disappeared and the NYMNPA now relies upon the written agreement and only considers that the management agreement was agreed over the 16 year period. The complainant says that this is because the shorter period benefits the NYMNPA financially. The NYMNPA says that it has not been able to find any evidence as to why the period was changed to 16 years, although it accepts that that may have been the initial plan. As the period signed by the complainant was 16 years however it relies on that as the contractual agreement entered into. Part of his requests included his wish to know if NYMNPA held any information which could shed light on why the length of the agreement had been changed, given that the NYMNPA now stated that the 16 year period was the agreed period.

23. The complainant sought to overturn the scheduling of the entire area land and says that he requested information and aid from the NYMNPA over an extended period of years to help him do that. In particular he sought a copy of a map which was used by EH to identify where and how widespread the archaeological remains were. EH said that it no longer held a copy of the map and so he sought this from the NYMNPA. He says that the NYMNPA withheld this information and refused to provide assistance to him by sending officers to reconsider the area further. The NYMNPA however said that scheduling is the responsibility of EH, and said that it did not hold a copy of the sketch plot map.
24. The complainant made a number of complaints, including to the ombudsman and his MP regarding the scheduling of the land. He was eventually successful in obtaining a reduction in the scheduled area of land to 2-3 acres from the original 16 through a decision by the Secretary of State after an independent expert had reviewed the site and provided advice. This whole appeal had however taken a large number of years during which he says that the NYMNPA continued to argue that it did not hold copies of the map.
25. The complainant's appeal was successful in December 2011. In February 2012 the NYMNPA disclosed a copy of the map. The complainant argues that the map would have made his appeal easier and quicker. He considers that the NYMNPA deliberately withheld this information in order to weaken his appeal chances. The NYMNPA however said that the map was found in an old, personal map box belonging to the officer who had previously been the archaeologist at the county council. It says that he had not previously realised that he still held that information until February after seeing correspondence relating to the land. He initially thought it would still be at the county council or had been destroyed, however he carried out a search for the map and found it. The information was then disclosed to the complainant.

26. The complainant says that he had been asking for the information frequently prior to that point. When the complainant made a complaint about this the NYMNPA partially upheld this complaint but said in mitigation that it had had no reason to believe that a copy of the map was held as it had been produced by the council in the 1980's, by the council, not the NYMNPA. The complainant however believes the timing of the disclosure was evidence that it had been deliberately withheld previously. He also holds an email from the officer which shows that the officer had reservations about the NYMNPA becoming involved in a matter which the officer considered was a matter to be decided between the complainant and EH.
27. In 2010, during the course of the appeal, the complainant received a letter from EH stating that he had built a fence on the scheduled land without a licence to do so. EH suggested that he may therefore have committed a criminal offence. He subsequently discovered that this letter was sent as a result of a letter from the same officer at the NYMNPA to EH informing them that a fence had been built surrounding the land, but the NYMNPA had not provided the complainant with a licence to do so. EH subsequently admitted that its letter was sent in error however and agreed to withdraw and destroy its copy. The complainant asked EH to also ask the NYMNPA to destroy its copy of that letter, which EH did via email. The complainant holds a copy of EH's email and a chaser email to the NYMNPA asking them to destroy the letter. The NYMNPA however states that it has no record of receiving a copy of the initial email. After further deliberation, it decided it would not destroy its copy of the criminal offence whilst matters were still in dispute.
28. This, and other discrepancies which the complainant has identified with the NYMNPA's responses have led him to conclude that there has been a deliberate and long standing attempt by the NYMNPA to frustrate or damage his appeal chances over the scheduled land. Additionally the NYMNPA has refused to write to EH stating that its advisers had doubts about the scheduling of the entire area of land in the first instance. The NYMNPA wrote to the complainant stating its officers had not had doubts (although they worked for other authorities at that time), and that there were still concerns that archaeological remains may be present in the now de-scheduled parts of the field. The NYMNPA however deferred to EH as the body responsible for decisions in that respect.

Delays in responding to requests

29. Regulation 5(1) states that subject to the exceptions with the Regulations, a public authority that holds environmental information shall make it available on request. Regulation 5(2) states that any information held should be provided "as soon as possible and no later

than 20 working days after the date of receipt of the request" unless one of the qualifications to this apply. There is no evidence to provide an exact date on which requests were made, as these were made verbally over the telephone. Nevertheless there is evidence that requests were made in the past and that the council did not provide the information in response to these.

30. The NYMNPAs considered a complaint from the complainant in this respect and partially upheld the complainant's complaint to it. It explained its reasons for not recognising that the map was held as above. It found that there was no evidence of deliberate concealment by the officer, or officers concerned.
31. The council did not provide the complainant with a copy of the map when he first requested it. Therefore, in subsequently finding that it did hold the map it breached section 5(2) as it did not provide it to him within 20 working days of his first asking for it.

Information not held

32. The Commissioner asked the authority to provide responses to each of the requests asked by the complainant, and to consider whether it holds any information which can answer the questions he asked of it.
33. The NYMNPAs responded detailing the searches it has carried out, and the likelihood of further information being held. As stated above, its arguments are effectively that it has disclosed information where it knows that it holds it or where it has subsequently discovered that information. It has carried out searches and asked relevant officers to ascertain whether information is held where it was appropriate to do so.
34. The NYMNPAs has gone through the requests outlined above and provided its response as follows.

"Copies of notes of my phone conversations with the Senior Archaeological Conservation Officer"

35. The NYMNPAs states that no formal notes were made of the conversations and no recent shorthand notes. However a handwritten note was disclosed from a shorthand notebook which an officer was using at that time. The NYMNPAs accepts that this was provided late however this was as a result of an administrative error. Again this amounts to a breach of Regulation 5(2).
36. The NYMNPAs states that it is not withholding any further notes. It says that if any earlier shorthand notes had been made by the relevant officers it would be difficult to locate these. It would not be possible to

state if or when any notes were taken or whether they were destroyed as they do not form part of any formal recording system.

37. The NYMNPA argues that to institute a search for this information would be likely to exceed the appropriate limit under section 12(1) of the FOI Act and be a significant burden on its resources. It therefore considered that it would be manifestly unreasonable for the purposes of Regulation 12(4)(b) to ask it to carry out searches for this sort of information, particularly when considering the amount of work and the volume of information which has already been disclosed to the complainant.
38. The Commissioner understands the argument as being that NYMNPA does not know whether further information is held, and would not be able to locate any information it does hold within its formal files. It has already searched its formal files and has confirmed that it does not hold relevant information within them.
39. If any information is held that would not be able to be easily identified or the information located. Informal notes taken by officers would not be held in any specific place or file and are likely to have been destroyed rather than retained once the immediate need or reason for the note was over.
40. The Commissioner notes that informal telephone notes are generally temporary in nature only. If they are not subsequently added to a file, as a formal record they are unlikely to be retained beyond their immediate need or use. They are recorded informally, then acted upon if necessary, and then subsequently destroyed. Although the NYMNPA has not specifically stated as such its argument is effectively that the information is not held.
41. Having considered the nature of the information , together with the description of the searches carried out by the NYMNPA the Commissioner's decision is that on a balance of probabilities the information is not held.

"Copies of the paperwork posted to EH and referred to in the email of 21 January 2010."

42. The NYMPA states that the email in question was sent over 2 years ago. It says that given the passage of time it does not know what paperwork was being referred to in the email as there is no documentary evidence held by the authority stating what was posted. It asked the officer concerned what was sent, who stated that as far they can remember the only information which was posted was copies of maps. It says however that maps and the wildlife conservation agreement which the email refers to have already been disclosed to the complainant as part of the

original documentation sent to him. In essence therefore if the officer has remembered correctly then the complainant has already been provided with the documents in question. If that is not the case the NYMNPA has not been able to identify the information which the complainant is seeking and the complainant is not able to clarify what that information may have been.

43. The NYMNPA is not able to identify what information was posted. Having considered this argument further the Commissioner has no option but to consider that on a balance of probabilities the information is not held.

"Copy of the email (?) from EH which prompted that Officer to send the email dated 15 November 2007 and also copies of the notes of the site visits referred to in that email."

44. The NYMNPA admits that initially it did not include a specific response to this part of the request in its response to the complainant of 30 April 2012. It says however that it does not hold this information. In concluding that this was the case the relevant officer was asked if she held a copy of a letter or email which had not been placed on the file. The response was that as this was 5 years ago the officer was unable to recall whether her response had been prompted by a letter, email or telephone call, and on reading the email this is not clear. The NYMNPA's email system automatically delete's email's after 1 year. If an email was held which was not specifically placed on the relevant file it would therefore no longer be held. It also records incoming post which requires a formal response on a database. The database for 2007 was checked but there was no record of a letter from EH regarding the land in question. The NYMNPA provided a copy of the relevant section of the database to the Commissioner as evidence that that was the case.

45. The Commissioner's decision is therefore that on a balance of probabilities no information is held which can respond to this part of the complainant's request.

46. As regards the questions asked by the complainant in his undated letter outlined above this was received by the NYMNPA on 9 May 2012. The NYMNPA considers that it responded to the majority of questions in its response of 23 May 2012. It states (and the complainant has confirmed) that there is only one question which the complainant believes information has been withheld. This was for notes of a conversation on 2 February 2012. The NYMNPA confirmed to the complainant however that information has never existed. It says that the officer spoke to the complainant on the telephone in the relevant period but that he did not make any notes. Again, given the explanation provided by the NYMNPA the Commissioner has decided that on a balance of probabilities no information is held.

47. The Commissioner understands that the complainant has also complained that the NYMNPA has not destroyed their copy of the 'criminal offence' letter from EH. The NYMNPA said that it would not destroy it due to the ongoing dispute. The Commissioner has no powers to require the authority to destroy the letter under the EIR however.
48. The complainant has also complained that the NYMNPA did not provide him with a copy of the letter from EH to it asking it asking it to destroy the EH letter. This would have been caught within his initial request for information but was not disclosed to him. The email was sent by EH to the NYMNPA on 2 March 2010. The complainant also holds a copy of an email from the Yorkshire and the Humber Inspector of Ancient Monuments dated 7 March 2012 to the NYMNPA confirming his request of 2010 to delete the letter, and asking it again to do so. He also obtained this from EH. He also holds a copy of the letter which EH sent to him dated 1 April 2010 confirming that it had asked the NYMNPA to delete the letter in question.
49. The chief executive of the NYMNPA met with the complainant on 11 July 2012. He accepted the complainant's evidence that EH had written to the NYMNPA, however he said that the NYMNPA had no record of ever receiving such a letter. A Director of the NYMNPA also wrote to the complainant on 23 May 2012 saying that she had not been able to locate a copy of the letter.
50. The Commissioner therefore considers that although the evidence is clear that a letter was sent to the authority on that date, NYMNPA either did not receive it, no longer holds it or at the least has not been able to locate it amongst its records. The Director did however offer in her letter to the complainant of 23 May 2012 to establish with EH whether the letter could be destroyed. This was apparently done, however as the letter was involved in the complainants dispute about the authority it subsequently declined to destroy it whilst this was ongoing.
51. The Commissioner recognises that the NYMNPA should hold a copy of the email because the email was clearly sent to it. The NYMNNPA states however that it has not been able to locate that email. The Commissioner notes that senior management at the NYMNPA have stated that the information is not held and that it cannot be located. Although the Commissioner recognises that the information should therefore be held, the question which he must consider is not whether it 'should' be held, but whether it is. Given the NYMNPA's has carried out searches for the information but has been unable to locate it the Commissioner's decision is that on a balance of probabilities the email is not held by NYMNPA.

Other Matters

52. Although they do not form part of this decision notice the Commissioner wishes to highlight the following matters of concern:

Verbal requests

53. Part of the complainant's complaint is that verbal requests for information from the NYMNPA were ignored or that he was told that information was not held. In particular he raises the request which he made for the sketch plot map. He said that the NYMNPA did not treat his requests for information as requests under the Regulations when it should have done.
54. The NYMNPA has said that it recognises that verbal requests can be made under the Regulations. It says that it provides its staff with training on recognising requests. It says however that it receives requests for information daily which could technically be considered to be verbal requests for information under the Regulations and so it treats many of these as normal course of business requests and simply deals with them.
55. It says the first record it has of a verbal request being made under the Regulations by the complainant was dated 12 August 2012, and that was responded to appropriately. It is clear however that discussions had taken place between the parties over a long period of time and the complainant argues that information was asked for in those discussions in the past. The requests for the map are one such example.
56. The Commissioner accepts the evidence that telephone calls were made which are likely to have included requests for information. The Commissioner notes that in the internal review response to the complainant the NYMNPA actually states that "*officers cannot recall you specifying your verbal request for information as EIR requests on earlier occasions*". It is clear therefore that the NYMNPA had received requests however it had not considered these to be made under the Regulations because the complainant did not specify that they should be treated as such. The complainant correctly points out however that there is no requirement on him to state that he is making the request under the Regulations in order for the request to be valid.
57. The Commissioner considers that the above comment raises concerns and the NYMNPA should ensure that its employees are aware that requestors do not have to specify that their request is being made under the Regulations when making a request for environmental information. In particular in cases where the NYMNPA is stating that information is not held, or where it is refusing a request for information it should

consider whether its response should be made formally under the Regulations to ensure that individual's rights are not overlooked.

58. The complainant's concerns in this respect have however been considered individually in the decision notice above.

Records Management Issues

59. The Commissioner recognises that the issues dealt with by the complainants request date back a number of years, and often relate to authorities who had responsibility for particular areas prior to the NYMNPAs. In spite of this the Commissioner notes that there have been a number of issues which raise concerns regarding the records management of the NYMPAs.
60. For example there are clearly issues regarding the receipt of emails from EH in this case. The complainant has proof that the emails should be held, however the authority is not able to explain how or why that information is not able to be found.

Right of appeal

61. 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

62. 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.
63. 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
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