

Environmental Information Regulations 2004

Decision Notice

Date: 16 December 2009

Public Authority: Kent County Council
Address: County Hall
Maidstone
Kent
ME14 1XQ

Summary

The complainant requested information from the council in relation to the proposals for a lorry park to deal with the impact of "Operation Stack". The council identified 15 documents falling within the scope of the request and disclosed these to the complainant. However it redacted information from two of the documents under regulation 12(4)(e) and 12(5)(e). The Commissioner has investigated and found that regulation 12(5)(e) is not engaged and that although regulation 12(4)(e) is engaged, the public interest in maintaining the exception does not outweigh the public interest in disclosure of the requested information.

The Commissioner's Role

1. 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

2. Operation Stack is invoked when Channel Ferry or Channel Tunnel crossings are disrupted, generally because of inclement weather or industrial action. This can happen between 8 and 12 times a year, closing long stretches of the M20 to local traffic so that lorries bound for the port can be parked on the motorway. This can cause traffic chaos and inconvenience to the people living in and working in Kent. In addition the lack of secure overnight parking for lorries results in them using lay-bys and side streets.
3. In light of this Kent County Council, working with other agencies, carried out a study and found that there was a need for a lorry park in Kent and that it should be dual purpose. As well as providing secure overnight parking it should be available in the event of Operation Stack. Kent County Council's preferred site for this is between junction 10 and 11 of the south side of the M20 between Sellindge and Aldington.

The Request

4. On 13 March 2008 the complainant made the following request for information to Kent County Council (the council):

“Please supply me with the copies of all information held by KCC connected with the use or development of land lying between the M20, the railway line, Station Road and Church Lane (in the Vicinity of Smeeth, Aldington and Sellindge) for the parking of lorries or HGV's and / or relating to 'Operation Stack'.”
5. The council responded to the request on 20 May 2008 and advised that most of the requested information was environmental and as such fell within the scope of the EIR. The council advised that 10 sites had been considered before reaching a decision for the lorry park. In relation to the specific information requested the council withheld this under section 22 of the Act and regulations 12(4)(e) and 12(4)(d) of the EIR.
6. The complainant requested an internal review of the decision on 2 June 2008.
7. The council provided the complainant with a response in a tabular format addressing each of the points he raised, the date of which is not clear. The review upheld the councils decision to withheld the majority of the requested information but did disclose to the complainant a redacted document entitled “Operation Stack Improvement Options – May 2007”.

The Investigation

Scope of the case

8. On 23 October 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation the council identified that there were 15 documents falling within the scope of the complainant's request. The council on review of the documents decided to disclose in full documents 2,3,4,5,6,7,8, 10, 13, 14 and 15. Documents 1 and 9 were provided to the complainant with some information redacted under 12(4)(e) and 12(5)(e) of the EIR and documents 11 and 12 were disclosed with information found to be outside of the scope of the request redacted.
10. Having viewed the information redacted from documents 11 and 12 the Commissioner is satisfied that this information is outside of the scope of the request.
11. This decision notice therefore only considers whether the council were correct to redact the information from documents 1 and 9 by virtue of regulation 12(4)(e) and 12(5)(e).

Chronology

12. The Commissioner began his investigation by writing to the council on 6 August 2009. This letter was in relation to a different case FS50217563 which involved a request for the same information. In this letter he asked the council to provide him with a copy of the information being withheld from the complainant and with further arguments to support its reliance the exemptions / exceptions cited.
13. The council responded on 3 September 2009 providing the Commissioner with a copy of the 15 documents it had identified as falling within the scope of that complainant's request and the request in this case. The council confirmed that document 1 is the document previously disclosed to both complainants at internal review with redactions. The council explained that it now considered all of the withheld information to be environmental information and that it was seeking to rely on regulation 12(4)(e) and 12(5)(e) to withhold this information. The council provided arguments to support its reliance on these exceptions.
14. The council wrote to the Commissioner again on 22 September 2008 stating that having had an opportunity to further review the documents it now considered that all of them could now be disclosed to the complainants. This was disclosed on 11 December 2009. The council redacted some information from documents 1 and 9 by virtue of regulation 12(4)(e) and 12(5)(e). The council also confirmed that

some information would be redacted from documents 11 and 12 which was outside of the scope of the request.

Findings of fact

15. The council identified 15 documents falling within the scope of the complainant's request:
 1. Operation Stack Improvement Options – May 2007
 2. Operation Stack Economic Impact Assessment by Channel Corridor Partnership (undated)
 3. Lorry Park and Operation Stack Q and A
 4. Undated document entitled "What is Operation Stack"
 5. Kent Overnight Lorry Park Study Executive Summary July 2005
 6. Letter to Dr Hilary Newport dated 6 June 2008
 7. Undated briefing on Operation Stack and overnight Lorry Park Problems
 8. Report to Kent Transport Board - 13 June 2005
 9. Report to Cabinet – 24 October 2005
 10. Report to Cabinet – 8 February 2007
 11. Minutes of Cabinet Meeting dated 8 February 2007
 12. Minutes of Cabinet Scrutiny Committee – 20 February 2007
 13. Cabinet Scrutiny Committee – 20 February 2007 – item 2
 14. Undated document entitled, "Easing the Pain of Operation Stack: proposal from CPRE Kent"
 15. Report to the Highways Advisory Board on Operation Stack and the Lorry Park – item 6 dated 8 May 2008.

16. The council have disclosed to the complainant all of the above documents but have redacted information from documents 11 and 12 which is outside of the scope of the request and information from documents 1 and 9 under regulation 12(4)(e) and 12(5)(e).

Analysis

Exceptions

Regulation 12(5)(e)

17. Regulation 12(5)(e) provides that a public authority may refuse to disclose information to the extent that 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.

18. The council have applied this regulation to the redactions in documents 1 and 9 which contain valuations of the sites.

19. For regulation 12(5)(e) to be engaged the Commissioner must consider the following questions:

- i) Is the information commercial or industrial in nature?
- ii) Is the information subject to a duty of confidence which is provided by law?
- iii) Is confidentiality provided to protect a legitimate economic interest?
- iv) Would that confidentiality which is provided to protect a legitimate economic interest be adversely affected by disclosure?

20. The Commissioner accepts that the information is commercial in nature as it is the valuation of the different site options for the Lorry Park and the purchase and development of the land would be a commercial transaction. However, the Commissioner must also establish if the information is subject to a duty of confidence which is provided by law. The council have not argued that the information is confidential merely that it is commercial or industrial in nature and that it therefore ought to be protected from disclosure. The council have not shown how any contractual or statutory duty of confidence attaches to the valuations in question.

21. The Commissioner does not consider that the council have demonstrated that the information is confidential; he therefore finds that the exception is not engaged.

12(4)(e)

22. Regulation 12(4)(e) provides that information is exempt if the request involves the disclosure of internal communications. The Commissioner considers that communications within one public authority will constitute internal communications for the purpose of regulation 12(4)(e) and that the definition of a communication is broad and will encompass any information intended to be communicated to others or to be placed on file where it may be consulted by others.

23. The redactions being made under regulation 12(4)(e) are contained within two documents: Operation Stack Improvement Options – May 2007; and Report to Cabinet – 24 October 2005. Both of these documents are internal council documents for the purposes of consultation within the council on the proposal regarding Operation Stack and the lorry park. The Commissioner accepts that these are 'internal communications' for the purposes of regulation 12(4)(e). He further notes that the redactions being withheld under regulation 12(4)(e) are those elements of the document which contain details of the alternative sites that have been considered for the lorry park and the valuations associated with the sites.

24. The Commissioner therefore finds that regulation 12(4)(e) is engaged.

Public Interest Test

25. As the Commissioner has found that regulation 12(4)(e) is engaged he must therefore consider, in line with 12(1)(b), if in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Commissioner notes that 12(2) states that a public authority shall apply a presumption in favour of disclosure.

26. Before considering the public interest test the council states that it is relevant to consider its broader position with regard to the proposed lorry park. The idea of building a lorry park, it states, has been raised as one possible solution for the very serious traffic congestion problems that arise in Kent when the port at Dover and / or the channel tunnel are closed due to bad weather or for other reasons. However, it continues to be just a proposal at this stage and there are significant funding and technical issues that would need to be addressed before the council commits to the construction of a lorry park.

27. If and when such a decision is taken, it will be necessary for the council to submit a planning application. This application, the council states, will contain all the information that has been requested by the complainant, including the identification of alternative sites that have been considered by the council. There is, therefore, a process by which the requested information will become available to the public in due course.

Public interest arguments in favour of disclosing the requested information

28. The council has acknowledged that there is a public interest in furthering the understanding of an participation of the public in the issues of the day; promoting accountability and transparency of public authorities and decisions taken by them; and allowing individuals to understand and challenge the decision made by public authorities affecting their lives.

29. The complainant has also argued that it is in the public interest to disclose the information as failure to do so will increase public anxiety and uncertainty and allow individuals to understand and challenge decisions made about the lorry park.

30. He also argued that disclosure of the information would allow the public to make representations or put forward alternative options or amendments which should not be limited to just the time at which a formal public consultation takes place. He states it would be in the public interest to have an input into the plans as they evolve as it is the stage at which proposals and representation may be made that may improve a formal plan.

31. The complainant also points to the Defra guidance on EIR which states that where public authorities consider the public interest test they should consider if the information sought “could reveal environmental impacts or potential impacts that may affect the public, whether access to the information is likely to support effective public participation or improve decision making.”

Public interest arguments in favour of maintaining the exception

32. The council argue that it considers that early release of the information – particularly as it identifies alternative sites for the location of the lorry park – could unnecessarily encourage speculation about the location of the park and this could have a negative effect on land values in the localities of the various alternative park sites. The council state that it is reluctant to expose local residents and land owners to such potential harm, in circumstances where the lorry park may never even go ahead and that if the decision is taken to proceed than the requested information will be made available to the public in due course.
33. The council also pointed the Commissioner to the arguments considered in Decision Notice FS50096973 arguing that this case is also relevant here. This request in that case was for a list of 170 schools nationwide which had been earmarked as potential candidates for academy school status. The council state that two of the arguments made in that case are relevant here. Firstly the Commissioner in that case took account of the potential harm to the morale of staff and students at schools affected that could arise from disclosure of the list: “to label or earmark an existing school as a future Academy send outs clear signal that the current standard of education in that school is not acceptable and that a radical transformation is required.”
34. Secondly it was noted in FS50096973 that the list was an early stage working document whose content changed regularly and that by the time the matter came before the Commissioner, 30 of the schools on the original list were no longer being considered for academy status. In those circumstances it was felt that disclosure of the list would cause needless disruption to these schools.
35. The council states that similar arguments apply in this case: residents and landowners would suffer potential blight as a consequence of the disclosure of proposed alternative locations for the lorry park; and such harm may in fact be quite needless if the council decides not to proceed with its construction.
36. Finally the council argue that the purpose of regulation 12(4)(e) is to afford officials a “private thinking space” in which sometimes difficult issues or options can be considered. If proper effect is not given to this exemption, there is a risk that the quality of a public authority’s decision making could be undermined as officers might become reluctant to properly articulate their advice or options that are being considered for fear of subsequent disclosure.

Balance of the public interest arguments

37. The Commissioner recognises that there is a potential harm from disclosure of the information, as outlined by the council, that landowners and residents could see a negative effect on their land values if potential sites for the lorry park are revealed. The Commissioner recognises that the potential negative effect on land values could result in premature external interference and disrupt internal debate and the fear of causing such damage to land owners would lead to a chilling effect on internal debate. However, the Commissioner also notes that the council have confirmed the identity of the preferred site despite the fact that the decision as to whether or not to proceed with a lorry park has not yet been taken. This seems to have been done without any of the same concerns regarding the potential impact on landowners and residents near this particular site.
38. In addition the Commissioner considers that there is a strong public interest in disclosing information which would inform public participation and debate around an issue of which there is clearly considerable public concern and anxiety. As outlined by the council the current situation is such that when 'Operation Stack' is initiated the impact on local traffic congestion is significant as well as the issues of litter and pollution left by lorries who use local side streets. There is a clear need to look at all the options for alternative ways of managing this situation and further disclosure of information which identifies all of the options being considered would aid the council and the public in assessing the options fully.
39. The information being withheld, as outlined above, reveals the alternative sites which have been considered by the council. The Commissioner believes that disclosure of this information would enable a more informed public debate to take place and allow the public to contribute more fully to the considerations being undertaken prior to any formal decisions being made.
40. The council have also argued that it is entitled to safe space whilst considering its options. The Commissioner recognises that this is a valid argument if the issue being debated is still live. However, the Commissioner also notes that as a preferred site has been identified and announced a significant landmark in the policy debate has already been reached and the need for a safe space has been diminished although he does recognise that as a final decision has yet to be taken the debate to some extent is still live. Although the overall decision as to whether to proceed with a lorry park has not yet been made, the decision or preferred option of where to site one if one were to go ahead has.
41. In reaching a decision as to the balance of public interest he has also considered that the information sought relates to an issue which will affect a large number of people within the local community and the decision as to whether to and where to build a lorry park is one which will have considerable environmental impact.

42. In light of all of this the Commissioner finds that the public interest in maintaining the exception does not outweigh the public interest in disclosure of the information.

The Decision

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

- Regulation 12(5)(e) is not engaged in respect of the redactions made from documents 1 and 9.
- Regulation 12(4)(e) is engaged in respect of the redactions made from documents 1 and 9 but the public interest in maintaining the exception does not outweigh the public interest in disclosure of the information
- By failing to provide the information to which the complainant was entitled the council breached the requirements of regulation 5(1).
- By failing to provide the information within 20 working days the council also breached the requirements of 5(2).

Steps Required

44. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- (i) Disclose to the complainant the information redacted from documents 1 and 9

45. The public authority must take the steps required by this Notice within 35 calendar days of the date of this Notice.

Failure to comply

46. 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

47. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 16th day of December 2009

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

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 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(2) A public authority shall apply a presumption in favour of disclosure.

Regulation 12(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

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;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

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 –

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (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 –
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

- (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

Regulation 12(6) For the purpose of paragraph (1), a public authority may respond to a request by neither confirming or denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

Regulation 12(7) For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

Regulation 12(8) For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

Regulation 12(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

Regulation 12(10) For the purpose of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

Regulation 12(11) Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.