

Environmental Information Regulations 2004

Decision Notice

Date: 24 May 2010

Public Authority: Royal Borough of Kensington and Chelsea
Address: Town Hall
Hornton Street
London
W8 7NX

Summary

The complainant requested an un-redacted copy of a report written by a senior officer at the council relating to the collection of waste at the Portobello and Golborne Markets in London. The report was written by the Head of Waste Management and Street Enforcement for the Arts, Parks and Leisure and Environmental Management Policy Board meeting dated 14 December 2007. The council disclosed parts of the report to the complainant however it redacted sections of it on the basis that regulation 12(4)(e) (internal communications) applied. The Commissioner's decision is that the council was able to apply regulation 12(4)(e) as the report was an internal communication. He has however decided that the balance of the public interest rests in disclosing the information in this instance.

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. The Portobello and Golborne Markets are historic markets in London. Some of the traders' families have traded from the same stalls for over 100 years. The markets serve the local community and are also a noted tourist destination, serving many thousands of visitors per year.
3. In 2007 a report was produced following recognition by the council that stall holders had been overcharged for the collection of their waste. Market stall holders' waste was collected by a private company under contract, and charges were levied against stall holders based on the total amount of waste which was collected. However an audit of the waste over one weekend found that it included a significant amount of waste from local stores and shops on the Portobello Road. Therefore the amounts used to calculate the costs for the market were inaccurate and it appeared that this error had been ongoing for a number of years. The additional waste increased the tonnages recorded as being collected from the market, which ultimately led to stall holders being overcharged for the collections.
4. The Market stall holders hired a consultant to try to establish the likely overpayment which was occurring. The council funded, and sought to work with that consultant. Coincidentally the council also used its own expert to filter sample waste collections to establish the true percentage of waste which was actually produced by the markets.
5. The council officer eventually produced the report which is the subject of the request in this case. This report indicated the likely overcharge for the year directly preceding the report, and provided recommendations to the policy board about compensation payments in response to that. Sections of the report also addressed the work and the report of the private consultant hired by the market.

The Request

6. On 10 February 2009 the complainant requested from the council:

"Further to our recent correspondence, please provide the full, un-redacted report plus background documentation on RBKC TELS officers' waste audit in Portobello & Golborne markets during the week commencing 23rd October 2007."

7. The council responded on 12 March 2009. It had considered the request under the Environmental Information Regulations 2004. It provided a redacted copy of the report, including the background documents contained in the appendices, however it redacted paragraphs 10 – 12 and 25 – 31 from it on the basis that regulation 12(4)(e) applied (internal communications).
8. On 27 April 2009 the complainant wrote back to the council and asked it to review its decision to redact sections of the report.
9. The council responded on 15 May 2009. It stated that the information was exempt for the same reasons. It added as regards the redaction of paragraphs 25 – 31 that:

“Our conventions as an officer body are that where there are options, even if some appear to be much more attractive than others, it is the duty of officers to set these out in order that political decision makers are not inadvertently induced to support one option to the exclusion of others...

The alternative is that there is an incentive for written material not to be kept at all and I believe that would undermine the standards of decision making that we aspire to hold.”

The Investigation

Scope of the case

10. On 2 July 2009 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider whether an un-redacted copy of the report should have been disclosed to her.

Chronology

11. The Commissioner wrote to the council on 7 July 2009 stating that an eligible complaint had been received.
12. The Commissioner wrote to the council again on 4 August 2009 asking the council to send him an un-redacted copy of the report. The council sent this to the Commissioner on 3 September 2009.
13. On 3 March 2010 the Commissioner again contacted the council. He asked the council to provide further information on the legal status of

the private consultant which the Portobello Market Committee had hired, Worktwice, and consider whether the arguments which had been submitted by the council would still stand if Worktwice was in liquidation at the time that the request was received.

14. The council responded on 17 March 2010. It confirmed that Worktwice had been in liquidation at the time that the request was received. It therefore accepted that paragraphs 10 -12 could be disclosed. The Commissioner has not therefore considered the redaction of these paragraphs further in this Decision Notice. This Decision Notice therefore refers to paragraphs 25 - 31 of the report only.

Analysis

Exceptions

Regulation 12(4)(e)

Is the information an internal communication?

15. Regulation 12(4)(e) of the EIR provides an exception from the duty to disclose environmental information on request which would involve the disclosure of an internal communication. The full text is provided in the legal annex to this Decision Notice. As a class based exception, it is not necessary to show that disclosure would cause prejudice or harm in order for the exception to be engaged. The council merely needs to show that the information is an internal communication.
16. The Commissioner has considered the information which has been withheld from the complainant and notes that it sits within a report entitled:

“Arts, Parks and Leisure and Environmental Management Policy Board, 14 December 2007

Report by the Head of Waste Management and Street Enforcement

The Markets waste audit: findings and implications”

The Commissioner is satisfied that the intention of the report was to communicate the findings and the recommendations of the Head of Waste Management and Street Enforcement to the policy board in order for it to make a decision on the councils approach to the

situation. He therefore accepts that the report is an internal communication and that Regulation 12(4)(e) is therefore engaged.

The public interest test

17. Regulation 12(1)(b) requires that a public interest test is carried out to ascertain whether the public interest in maintaining the exception in regulation 12(4)(e) outweighs the public interest in disclosing the information. The Commissioner must also bear in mind the presumption in favour of disclosure provided by Regulation 12(2) in this deliberation.

The public interest in the information being disclosed

18. The central public interest in the information being disclosed rests in creating greater transparency of the council's decision making in this case, and allowing greater levels of scrutiny on the report's findings and the alternative options open to the cabinet members when it made its decision.
19. The decision to compensate market traders was controversial, and a significant amount of taxpayers' money, reportedly over £700,000, was paid out. The council states that it remains a matter of public concern, and that the issues concerned were raised with vigour in a recent by-election. The Commissioner notes however, that there was no real policy decision relating to the payments left to make at the time of the request.
20. Through a disclosure of this information the public might better understand why the council decided to compensate market traders to the level it did, and what other options it had available when it made that decision.
21. On the counter side, many of the traders consider that the compensation payment, albeit welcome, did not adequately compensate them as they believe that they may have been overcharged for decades. The press has highlighted that rents for shops and stalls at the market have increased and other factors such as an influx of large "chains" and supermarkets have pushed rent prices to a point where there are significant financial pressures on many of the traditional stall holders. The council too has considered this to be an important issue and has looked at ways of providing support to traditional market traders as a means to maintain the character of the market. A payment of further compensation might therefore support the continuation of these stalls. There is therefore an additional public interest in disclosure to further the public debate about pressures on stallholders.

The public interest in maintaining the exception

22. The council states that the primary public interest in the exception being maintained is that its disclosure would have an adverse impact on the ability of council officers to communicate in an effective and private manner with each other. The Commissioner has considered the redacted paragraphs and agrees that it contains full and frank information, options and recommendations to the board as to how the council might respond to the situation. It is noted however that only the officer's recommendation was redacted from the report.
23. Although there is no requirement for the authority to demonstrate harm or prejudice in order to engage the exception, the Commissioner considers that in assessing the public interest in maintaining the exception he can take into account any harm which would be caused if the information was disclosed.

What harm might be caused by the disclosure of the information?

24. The council argues that if the information was to be disclosed this would undermine officers' ability to provide full written advice and recommendations in the future. It is in the public interest that council officers have confidence that they can provide elected decision makers with full and frank opinions and advice and highlight the options open to it, and that these can be recorded and identified with individual officers.
25. The council also states that it is convenient that all available options are provided to cabinet members by responsible officers in order that full information is known by elected members when they make their decision.
26. Providing a range of options would potentially include some which do not support the views of particular parties involved in a dispute. A disclosure might therefore undermine officers' positions with those parties in any future negotiations they have with that party. The Commissioner notes that this would occur even though the officer was acting appropriately in highlighting the possible courses of action open to the council. A disclosure might therefore destabilise the rapport between officers and third parties who might believe that their trust had been undermined. This would then make any future negotiations between those parties more difficult if not impossible.
27. The council's decision to compensate was based, in full or in part, on the contents of this report. The payments were at a significant cost to taxpayers. The issues discussed in the report, together with the

council's response to those issues still retain their relevance and sensitivity and are an ongoing issue in the area around the market.

28. The council has also provided other arguments which are considered in a confidential annex to this report. This confidential annex has only been supplied to the council as it refers to specific details in the exempted information and its analysis would entail a disclosure of some of the exempted information itself.

Balance of the public interest arguments

29. The Commissioner has balanced all of the above arguments and the arguments considered in the confidential annex to this Decision Notice to reach his decision. He recognises the strong public interest in street traders and taxpayers in the area understanding what led to the compensation payout, how these problems occurred and the options which were available to the council from which it made its decision.
30. The sections of the report which have already been disclosed highlight the issues which have given rise to the need to provide compensation to market traders. The public therefore already has an understanding of the reasons why the council made compensation payments.
31. The Commissioner must also take into account that council officers might also sometimes need to provide full and frank information, advice and make recommendations to the decision makers outside of the public eye.
32. However the Commissioner also considers that the public interest in knowing how a significant sum of taxpayer's money came to be paid to market traders outweighs the public interest in withholding the information in this instance.
33. The Commissioners decision is that the public interest in maintaining the exception does not outweigh the public interest in disclosing the information in this instance.

The Decision

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

The council breached regulation 5(1) in that it did not provide a copy of the information to the complainant.

The council was not correct to apply Regulation 12(4)(e) to the information.

Steps Required

35. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - To disclose the redacted information in the report to the complainant.
36. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

37. 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

38. 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: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

39. 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.
40. 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 24th day of May 2010

Signed

**Gerrard Tracey
Principal Policy Adviser**

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

Legal Annex

Exceptions to the duty to disclose environmental information

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.

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

...

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(e) the request involves the disclosure of internal communications.