Reference: FER0306099

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

Decision Notice

Date: 31 January 2011

Public Authority: Herefordshire Council
Address: 35 Hafod Road
Hereford
Herefordshire
HR1 1SH

Summary

The complainant made a request to Herefordshire Council for the copies of site visit reports made by officers who had visited Newton Farm on 19 August 2009.The Commissioner is satisfied that all relevant reports have now been provided to the complainant. However, as the Council failed to make the requested information available within 20 working days following receipt of the request, the Commissioner concluded that it breached 5(2) of the Environmental Information Regulations. As the complainant has now received the requested information the Commissioner has not ordered the Council to take any steps.

The Commissioner's Role

1. The Environmental Information Regulations (EIR) was 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 complainant claimed to have suffered serious flooding on 5 September 2008 from a neighbouring property that required remedial work under the Land Drainage Act. The complainant believes that much of the remedial work has not been completed by the Council. The Interim Chief Executive of Herefordshire along with other officers visited the site at Newton Farm, Welsh Newton on 19 August 2009 in the hope of addressing the concerns of the complainant and other interested parties. With regards to The Pond, the watercourse that was subject to flooding, the Council's Land Drainage Engineer took the view, contrary to that of the complainant, that everything necessary for its upkeep had been done.

The Request

3. On 31 October 2009 the complainant made a written request to Herefordshire Council ('the Council') for information relating to a site visit by Council officers. The complainant asked the Interim Chief Executive for:

"..copies of each of the reports from each officer who visited Newton Farm, Welsh Newton with you on 19 August 2009..".

4. The Council wrote to the complainant on 3 November 2009 to advise that background papers would not be of assistance to the complainant. It further advised her to contact them if she wished to pursue the release of any documentation under the Freedom of Information Act.

5. A further telephone request for the same information was made by the complainant to the Council on 4 November 2009. This content of the telephone request was confirmed in writing by the Council on 6 November 2009.

6. On 4 December 2009 the Council wrote to the complainant to confirm that it held information relating to the site visit. It advised that it hoped to get the information to her during the week commencing 7 December 2009 and apologised for the slight delay.

7. On 17 December 2009 the Council wrote to the complainant and apologised for the delay in responding. The Council provided the

complainant with all the information that it held with regards to the site visit.

8. The complainant telephoned the Council to notify it of the existence of other reports. The Council wrote to the complainant on 18 January 2010 and provided her with a copy of an additional report.

9. On 21 January 2010 the complainant wrote to the Council raising issues relating to the withholding of information and which was acknowledged on 25 January 2010.

10. The complainant again telephoned the Council (date not known). On 26 January 2010 the Council, as a direct result of the telephone exchange, provided additional information that it had previously omitted. The Council did offer its apologies for its oversight.

11. The Council wrote to the complainant on 11 February 2010 to advise that it was not withholding any information that had been requested by her.

12. The complainant wrote to the Council on 17 February 2010 to seek clarification and on 5 March 2010 to lodge a level 3 complaint regarding the handling of her request.

13. The Council wrote to the complainant on 10 March 2010 to again advise that all relevant document and information had been sent to her. It also advised that if the complainant wished to take matters further she would need to contact the Local Government Ombudsman.

14. The complainant wrote to the Council on 20 March 2010 to again raise issues surrounding the handling of her request and the lack of acknowledgement of her level 3 complaint.

The Investigation

Scope of the case

15. The Commissioner would usually expect a complainant to have exhausted a public authority's internal review process before approaching him with a complaint under section 50 of the Act. In this case however as there was some confusion as to whether a review had been requested or not, the Commissioner considered it appropriate to assess this complaint as the exchanges previously

described clearly indicate that the council had been afforded an opportunity to revisit the matter subsequent to its initial refusal.

16 On 31 March 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled.

17. The Commissioner's investigation has concentrated on establishing as to whether all the information covered by the request has been provided to the complainant

18. The complainant also raised other issues, including criminal behaviour beyond the realm of EIR that are not addressed in this Notice because they are not requirements of Part 1 of the Act or the EIR.

Chronology

19. The Commissioner wrote to the Council on 8 June 2010 to confirm that he would proceed to consider the case in relation to the Council's compliance with Part 1 of the Act.

20. The Council responded on 22 June 2010 to confirm that all requested information had been forwarded to the complainant along with explanations for its delays.

Analysis

Substantive Procedural Matters

Is the information environmental?

21. Environmental information is defined in regulation 2(1)(c) of the EIR as including `*measures (including administrative measures), such as policies,… plans… 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*`(statutory provisions relevant to the complaint are set out in full in the Legal Annex to this Decision Notice). The Commissioner recognises that the regulation covers information <u>on</u> measures rather than the information itself being a measure. The site visit report can be considered to contain information on the state of elements of the environment in particular water, soil and the land. It can be considered as information on a relevant measure, in this case the

upkeep of waterways and surrounding land that is likely to affect the elements of the environment. The Commissioner considers that the information requested falls within the broad definition in regulation 2(1)(c).

22. It is apparent that the Council did not recognise that the request of 31 October 2009 should have been considered formally as an information request; consequently, it did not provide a response which was compliant with the requirements of the legislation. Whilst it is clear from the Council's response of 3 November 2009 that it held background papers that may be of relevance to the complainant, it did not confirm that it held information specified in the request. The Council was cognisant of the fact that the background papers constituted information that was covered by the Act and consequently did invite the complainant to make a request under the Act. The Commissioner is of the view that this was an unnecessary step and that it should have treated the letter of 31 October as a valid request. Whilst the Council initially suggested that a request under the Act could be made, there was a tacit acknowledgement subsequently that it should be dealt with under EIR instead.

23. The Council did provide to the complainant all the relevant information that it believed it held on 17 December 2009.It was not until the intervention of the complainant herself that an additional report from the Public Rights of Way officer was identified by the Council. This was subsequently sent to the complainant on 18 January 2010. The Council did explain to the Commissioner that the reason for omitting this report initially was the result of an administrative oversight. In gathering the information, a list of all the names of the officers who visited the site was sent to the collating officer. However it transpires that the name of the Public Rights of Way officer, for reasons unknown, was not included on the list. Consequently the collating officer did not pursue the report from the Public Rights of Way officer. Having seen the correspondence to the collating officer, the Commissioner is of the opinion that an administrative oversight is the most likely explanation as to why this particular report was not initially identified.

24. The Council did initially fail to provide to the complainant the last page of the A.L.T report that was attached to the email of 20 August 2009 from the Bridges and Structures Manager. This was rectified on 26 January 2010 after having been brought to its attention by the complainant. The Council have been unable to explain the reason for this omission but did offer its apologies to the

complainant at the time. The Commissioner has found no evidence to suggest that this omission was anything other than an administrative oversight.

25. The Council have confirmed that reports made by five of the six officers who visited the site (along with the Interim Deputy Chief Executive) have been provided to the complainant. It further confirmed that the sixth officer, the Development Control Manager, had made no written report of the visit. There is no evidence to suggest that the Council is withholding any reports of the site visit. Whilst the complainant has raised issues regarding delay subsequently to her request, she has not contested the fact that all information relevant to her request has now been provided.

Regulation 5

26. All sections of the legislation are reproduced in the attached legal annex.

27. Regulation 5(1) provides that environmental information shall be made available upon request. Regulation 5(2) provides that this information should be made available within 20 days following the receipt of the request.

28. The complainant's initial request was made on 31 October 2009. It was not until 26 January 2010 that all information was finally sent to her. The Commissioner therefore concludes that the Council has breached regulation 5(2) by failing to make the information available within 20 working days following receipt of the request.

The Decision

29. The Commissioner has decided that the following element of the request was not in accordance with the EIR:

- The Council responded later than 20 working days following receipt of the request and did not therefore comply with Regulation 5(2).

Steps Required

30. As the complainant has received the information requested the Commissioner requires no steps to be taken.

Other matters

31. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

32. Although the request to the Council on 31 October 2009 did not specify it had been made under the provisions of the Act (or the EIR), the Commissioner is concerned that the Council failed to treat it as a valid information request.

33 Under the EIR there is a statutory time limit for conducting an internal review which must be done within 40 days.

34 As he has made clear in his *'Good Practice Guidance No 5',* published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible and under the EIR the time taken to complete a review must not exceed 40 working days. Whilst the complainant did not make an explicit request for an internal review, it is the view of the Commissioner that her letter of 5 March 2010 to the Chief Executive should have been treated as such a request. The Commissioner is concerned that a review was not undertaken in response to the letter or indeed her follow up letter of 20 March 2010 and that this state of affairs remains to this date. The Council did not appear to recognise the complaint as a request for internal review and consequently engaged in a multi-stage complaints process (contrary to the Commissioner's guidance) and also referred the matter the Local Government Ombudsman rather than to the Information Commissioner.

Right of Appeal

35 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

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 sent.

Dated the 31st day of January 2011

Signed ……..

Andrew White
Group Manager – Complaints Resolution

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

Legal Annex

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 those 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;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

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.

(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.