

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

Decision Notice

Date: 7 February 2011

Public Authority: Telford & Wrekin Council
Address: Civic Offices
PO Box 215
Telford
TF3 4LF

Summary

The complainant requested information relating to the sale of a particular piece of land. The Council provided some information relevant to the request but withheld other information citing sections 42 and 43 of the Act and regulation 12(5)(e) of the EIR. The Commissioner has investigated and determined that all of the information requested constitutes environmental information and the correct access regime is the EIR. The Commissioner requires the Council to reconsider the request under the EIR and either disclose the information requested or issue a valid refusal notice in accordance with regulation 14 of the EIR.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.
2. 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

3. In September 2008, the Council announced that it was seeking bidders for the development of a piece of land, which at that time accommodated the Council's Civic Offices. At a Cabinet meeting on 9 March 2009¹ (agenda item CB-165), it was resolved that authority be given to negotiate and enter into a conditional contract with the preferred bidder for the sale of the Civic Offices site. On 11 March 2009 the Council announced its decision to sell the site to Asda Stores. The Council subsequently entered into a Conditional Sale Agreement ('the Agreement') with Asda Stores and McLagan Investments Limited on 14 August 2009.
4. In October 2009 Asda Stores submitted a planning application to the Council for the development of the site. On 11 March 2010 the Council granted planning permission to Asda Stores to develop a new superstore, petrol filling station, car parking, servicing and to undertake associated landscaping and access work, including realignment of a road.

The Request

5. On 25 September 2009, the complainant wrote to the Council and requested:
 1. "a copy of the agreement for sale dated 14 August 2009 made between Telford & Wrekin Council (1) McLagan Investments Limited (2) and Asda Stores Limited (3);
 2. a copy of the report and any supporting papers presented to Cabinet at the meeting on 9 March 2009 together with any previous and/or subsequent reports to Cabinet concerning the proposed sale of the land which is subject to the agreement for sale;
 3. correspondence, including emails, notes of telephone calls and/or meetings, letters and memorandums and/or internal file notes between Telford & Wrekin Council and Asda and/or McLagan Investments Limited relating to the terms and conditions for the agreement for sale;

¹ <http://www.telford.gov.uk/apps/demservice/DisplayDocument.asp?type=pdf&ref=10964>

4. internal correspondence including emails, notes of telephone calls, letters and memorandums and/or minutes or file notes of internal meetings/discussions within Telford & Wrekin Council about the sale;
 5. internal correspondence including emails, notes of telephone calls, letters, memorandum and/or minutes or file notes of meetings/discussions between Telford & Wrekin Council Planning and Estates departments about the sale or the planning policy allocation of the civic offices site within the existing development plan or the emerging Central Telford Area Action Plan; and
 6. any correspondence including emails, notes of telephone calls and/or meetings, letters and memorandum and/or internal file notes between Telford & Wrekin Council and Asda relating to the planning application for the new Asda store".
6. The Council acknowledged the request on 2 October 2009, and on 22 October 2009 wrote to the complainant advising that it needed to extend the deadline for response to 27 November 2009 to consider the public interest test.
 7. On 27 November 2009 the Council disclosed some information relevant to the request. The Council stated that other information it held relevant to parts 1 to 5 of the request was exempt under section 43 of the Act and information relevant to part 6 was exempt under regulation 12(5)(f) of the EIR. The Council did not provide any details of its public interest test considerations and stated only that it considered the public interest to favour non-disclosure.
 8. The complainant requested an internal review of the Council's decision on 10 December 2009.
 9. On 10 February 2010 the Council provided the outcome of its internal review. It upheld its decision not to release the information requested and considered the following exemptions and exceptions to be applicable to the information requested:
 - Parts 1–4 – exempt under section 43 of the Act.
 - Parts 2–4 – exempt under section 42 of the Act.
 - Part 5 – exempt under section 21 of the Act.
 - Part 6 – exempt under sections 42 and 43 of the Act and regulation 12(5)(e) of the EIR.

The Investigation

Scope of the case

10. On 9 April 2010, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
- The delays on the part of the Council in dealing with the request.
 - The Council's application of sections 43, 42 and regulation 12(5)(e) to parts 1 to 4 and 6 of the request and whether the information requested should be disclosed.

Chronology

11. On 12 May 2010, the Commissioner wrote to the Council to confirm that the complaint had been deemed eligible for formal consideration and to request copies of the withheld information.
12. On 11 June 2010, the Council wrote to the Commissioner to explain that it had been referred to Judicial Review in relation to the granting of planning permission for development on the Civic Offices site (the date of which had yet to be confirmed). The Council asked the Commissioner for an extension to the time to respond to allow it to review the results of the Judicial Review when they became available.
13. On 13 July 2010, the Commissioner wrote a further letter to the Council stating that he could be unable to delay his investigation of the case pending the outcome any forthcoming Judicial Review. The Commissioner advised the Council that, in the absence of sight of the withheld information, his preliminary view - based on the nature of the request - was that all the requested information was environmental information, as defined by regulation 2(1) of the EIR. The Commissioner asked the Council if it agreed with this assessment and if it would reconsider the case under the EIR. The Commissioner requested copies of the withheld information in order for him to further consider whether the withheld information was environmental information. He also asked the Council to indicate which exemptions/exceptions it was relying on in relation to each piece of withheld information, and any further representations as to why it considered the information exempt from disclosure.
14. The Council responded on 5 August 2010 and said that it did not agree that the request in its entirety should have been handled under the EIR. The Council stated that it considered the information it held relevant to parts 1 to 4 of the request to be strictly commercial in nature, as

opposed to environmental. The Council also stated that it felt it was premature to provide the withheld information to the Commissioner until a final decision had been made in respect of the correct access regime. Further, the Council felt it would be an inappropriate use of its time to review the withheld information and indicate which exemptions it considered applicable to each part of the information until a decision had been made on the correct access regime.

15. On 6 August 2010 the Commissioner telephoned the Council to advise that he would require copies of the withheld information in order to determine the correct access regime for the request.
16. The Council wrote to the Commissioner on 12 August 2010 stating that it was in the process of collating the relevant information, but as the matter was considered highly sensitive, it intended to seek Counsel's opinion on how to proceed.
17. The Commissioner telephoned the Council on 16 and 17 August 2010 in order to ascertain when he would be provided with copies of the withheld information.
18. On 18 August 2010 the Council wrote to the Commissioner advising that it would not provide copies of the withheld information unless it was required to do so pursuant to an Information Notice being issued under section 51 of the Act.
19. On 19 August 2010, the Commissioner served an Information Notice on the Council in accordance with section 51 of the Act, requiring it to provide him with copies of the withheld information falling within the scope of the request.
20. The Council provided the Commissioner with copies of the withheld information which consisted of an unstructured box of loose sheets of paper. Following further discussions between the Council and the Commissioner, on 27 September 2010, the Council provided a duplicate set of the withheld information to the Commissioner, which had been organised to reflect the information it considered to be relevant to each part of the request.
21. After considering the voluminous withheld information, the Commissioner wrote to the Council on 17 December 2010 confirming that, in his view, the withheld information constituted environmental information. He asked the Council to reconsider the case under the EIR and either disclose the information or provide details of any exceptions it was relying on.

22. On 17 January 2011 the Council wrote to the Commissioner advising that it did not agree that the withheld information was environmental and wished to seek a review of the Commissioner's decision.

Analysis

Correct Access Regime

23. The Council originally processed the complainant's request for information under both the Act and the EIR and considered the information to be exempt under sections 42 and 43 of the Act and regulation 12(5)(e) of the EIR. However, the Commissioner considers that all of the information requested constitutes environmental information and that the correct access regime is, therefore, the EIR.
24. The Commissioner has determined that the requested information would fall within the definition of environmental information set out at regulation 2(1)(c) of the EIR. This provides that:

"'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 on—
(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."

The full text of regulation 2(1) is included in the legal annex to this notice.

25. The Commissioner considers that the phrase "any information ...on" should be interpreted widely and that this in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which is implemented into UK Law through the EIR. The Commissioner does not consider it necessary for the requested information itself to have a direct effect on the environment in order for it to be environmental information. It will usually include information concerning, about, or relating to measures, activities and factors likely to affect the state of the elements of the environment.

Parts 1 to 4 of the request

26. In essence, the withheld information falling within the scope of parts 1 to 4 of the request comprises of a copy of the Agreement dated 14

August 2009 (part 1 of request), and other information relating to the sale and the Agreement (parts 2 to 4 of the request).

27. In reaching a view as to whether the information relevant to parts 1 to 4 of the request constitutes environmental information, the Commissioner notes that the purpose of the sale of the land in question was to help fund the Council's move to another office(s) and to help it redevelop/regenerate the town centre. The press release issued by the Council in March 2009 relating to the sale also included a number of references that suggest the sale was conditional on development/redevelopment of the land, for example:
- "the proposed sale.....is an important part of the Council's ambitious regeneration programme to Transform Telford Town Centre".
 - "ASDA will now prepare their proposals for the Civic Offices site and it is anticipated that they will submit a planning application in the coming months. The proposals could include a mixed use development, which may incorporate residential, retail and offices".
 - "Property Communications Manager at Asda Chris Marlow said 'We are delighted to have been chosen as the successful bidder for the regeneration of the Civic Offices site'".
28. Further, having viewed a copy of the Agreement, it contains a number of satisfying conditions, some of which relate to development of the land and the agreement is conditional on all satisfying conditions being met. Based on the fact that the Agreement is conditional on redevelopment of the land in question, the Commissioner is satisfied that the Agreement constitutes environmental information, as defined by Regulation 2(1)(c). This is because it is information on (concerning, relating to, or about) a measure which is likely to affect the elements of the environment as set out in regulation 2(1)(a); in particular land and landscape.
29. The other withheld information (relating to parts 2 to 4 of the request), broadly comprises of draft copies of the Agreement, other communications relating to negotiations leading up to the Agreement being signed (emails, notes of meetings and discussions), and various reports relating to the Agreement (for example reports to Cabinet and Council). The Commissioner is satisfied that the withheld information relevant to parts 2 to 4 of the request comprises information that can be linked back to the Agreement. As such, the Commissioner considers it would also constitute information on a measure (the development of the land) likely to affect the elements of the environment as set out in regulation 2(1)(a), in particular land and landscape.

Part 6 of the request

30. Part 6 of the request, as detailed in paragraph 3 above refers to information concerning the planning application submitted, following the sale agreement, for development of the land in question. Although the Council has considered this part of the request under the EIR and applied regulation 12(5)(e), it has also considered it under the Act and applied sections 42 and 43. The Council has not clarified which parts of the information it considers to be environmental information. Neither has the Council clarified the exemptions and exceptions it has applied to specific elements of the withheld information. In the absence of this detail, the Commissioner is unable to assess whether any exemptions or exceptions have been correctly applied.
31. The requested information relates to a planning application submitted in October 2009 for a substantial development of a new superstore, filling station and car park on land subject to the Agreement. The Commissioner is satisfied that all of the information held by the Council in relation to part 6 of the request constitutes environmental information as defined under regulation 2(1)(c) of the EIR. This is because it is information on measures and activities, affecting or likely to affect the elements of the environment and factors likely to affect those elements referred to in regulations 2(1)(a) and (b) of the EIR. In this case, the planning application process is the activity under regulation 2(1)(c) which is likely to affect the landscape (as set out in regulation 2(1)(a)) upon which development may take place as a result of planning decisions by the Council.

The Decision

32. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the EIR in that it did not apply the correct legislation when handling the request

Steps Required

33. As the Commissioner has determined that the correct access regime for the request is the EIR he requires the Council to either provide the information requested or issue a valid refusal notice that complies with regulation 14 of the EIR.

Failure to comply

34. 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

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

36. 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.
37. 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 7th day of February 2011

Signed

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

Legal Annex

Environmental Information Regulations 2004

Regulation 2 - Interpretation

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 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;
- (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 elements of the environment referred to in (b) and (c);

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 –

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

Freedom of Information Act 2000

Legal Professional Privilege

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

Section 42(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”

Commercial interests

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

Section 43(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”