

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

Decision Notice

Date: 7 March 2011

Public Authority: National Audit Office
Address: 157-197 Buckingham Palace Road
Victoria
London
SW1W 9SP

Summary

The complainant requested copies of information received by the public authority from the Environment Agency and other agencies, related to Whitburn Pumping Station. The public authority refused to disclose the information, relying upon regulations 13(2)(a)(i) and 12(5)(a) of the Environmental Information Regulations 2004. The Commissioner upholds the application of regulation 12(5)(a).

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. In 1999 applications were made by Northumbrian Water Limited ("NWL") to vary consents to discharge storm sewage to reflect changes to operational practices in Whitburn and Hendon. The applications were advertised and led to thousands of objections, collected by petition by various individuals and groups. In December 2002 a report was produced following a public inquiry to determine these variations.

3. In this present case, the complainant and the public authority have made references to an earlier decision by the Commissioner (FER0219897). This earlier decision dealt with a previous request for information by the complainant to the Department for Environment, Food and Rural Affairs ("Defra") for a copy of the UK Government's response to the European Commission's ("the EC") Reasoned Opinion concerning Whitburn storm water pumping station. A Reasoned Opinion sets out the reasons why the EC considered there had been an infringement of EU law; it also serves as a final written warning in the infraction proceedings being taken against a Member State.
4. The information requested related to the implementation of the EU Urban Waste Water Treatment Directive (91/271/EEC) ("the Directive"). The Commissioner found that Defra was correct to withhold the requested information under regulation 12(5)(a).
5. This was because the requested information was part of the first phase of infraction proceedings. The Commissioner notes that in paragraph 5 of this earlier decision he noted that it was possible that the EC might refer a case to the European Court of Justice (the "ECJ").
6. The Commissioner notes that the present complaint is related to information which forms part of the infraction process referred to in FER0219897. This infraction hearing has been referred to ECJ by the EC.

The Request

7. On 30 March 2010 the complainant contacted the public authority. He explained that he knew that the EC would not be examining whether there was a misuse of public money. The complainant alleged that the UK purchased a sewage system that does not work. He further stated that it was the public authority's role to examine whether the sewage system in question represented value for money or to see if the UK government spent public money wisely on a sewage system that does not work. He asserted that it was the role of the public authority as the Environment Agency ("the Agency") and Ofwat were not competent to investigate this. The complainant went on to make the following request:

'For this reason and under the Environmental Information Regulations please would you provide copies of all correspondence from the EA and other Agency's (sic) which have supplied you with information since I made my complaint to the NAO as I believe they are misleading you?'

8. On 27 April 2010 the public authority issued a refusal notice, explaining that it held 3 pieces of information that fell within the terms of his request. It disclosed a briefing note entitled: '*Contentious Issues Briefing Note. The Whitburn and Hendon Sewerage Scheme*' but withheld some information in it under regulation 13. It also explained that it was withholding the second piece of information entitled '*Urban Waste Water Treatment Directive (UWWTD) Combined Sewer Overflows (CSOs) Infraction Case*' under 12(5)(a) and the third piece of information was a copy of an Information Tribunal ("the Tribunal") decision in which the complainant was the appellant, so he would already have a copy of it.
9. On 30 April 2010 the public authority wrote to the complainant following a telephone conversation with him. It confirmed that its role was to report to Parliament on the economy, efficiency and effectiveness with which public money is spent. It clarified that in relation to this case, it would examine whether the Agency had adequate and cost effective systems in place to ensure compliance with relevant legislation, guidelines and protocols in relation to the implementation of the sewerage system and subsequent monitoring of the water quality. However the public authority also explained that it was not a technical expert therefore it could not interpret any readings; its focus would be on the value for money of the Agency's approach.
10. On 10 May 2010 the complainant requested an internal review; on 9 June 2010 the public authority confirmed it had carried out the review, withholding the information on the same grounds.

The Investigation

Scope of the case

11. On 28 June 2010 the complainant contacted the Commissioner to complain about the way in which his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - Following the ICO's previous decision the Agency had provided the public authority with a briefing note to cover up the cracks in this case.
 - This briefing note, which is the same briefing note that the Agency supplied to Defra and in turn provided to the EC, contained information that was untrue.

- The NAO interest has to be the public's interest as it is the public who are paying the money; it would not serve the public interest to tell lies to the EC and pretend that the terms of a EC Directive are being met.
 - The ICO cannot have meant that infraction proceedings would go ahead with false information after its decision in FER0219897.
12. The Commissioner notes that the complainant has complained about the information withheld under regulation 12(5)(a) and has not complained about the application of regulation 13; therefore the Commissioner will not consider the information withheld under regulation 13.
13. The complainant also stated that he was going to complain about the way in which the Commissioner handled his earlier complaint which resulted in the decision notice referred to in paragraphs 3 and 4. However before he does this he wanted this present complaint to be treated with the utmost haste before the issuing of the proceedings.

Chronology

14. On 8 November 2010 the Commissioner contacted the public authority for clarification about what stage the infraction hearing was at.
15. On 11 November 2010 the Commissioner contacted the complainant requesting a copy of the refusal notice issued by the public authority; the complainant provided this on 16 November 2010.
16. On 26 November 2010 the public authority explained that it had consulted Defra and the Agency who had both confirmed that the infraction case had been referred to the ECJ by the EC.

Analysis

17. The Commissioner has to decide whether the request should have been dealt with under the Act or the EIR. The public authority considers that the information in question should be withheld under regulation 12(5)(a) of the EIR.
18. The Commissioner is satisfied that the EIR is the correct access regime; he is satisfied that the information falls under regulation 2(1)(b) as it relates to waste and other releases into the environment:
- "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-*

(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)

Exception

Regulation 12(5)(a)

19. Regulation 12(5)(a) allows information to be withheld by a public authority if disclosure would adversely affect –

(a) international relations, defence, national security or public safety.

20. This exception is also subject to the public interest as identified in regulation 12(1)(b):

in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

21. The Commissioner also notes that there is a presumption on disclosure under regulation 12(2). (See the Legal Annex at the end of this notice for the full text of the regulations).

Adversely affect

22. In order for regulation 12(5)(a) to apply it is necessary to establish that international relations would be adversely affected if the withheld information was to be disclosed.

23. The Commissioner is satisfied that the term 'international relations' includes relations with the EC.

24. It is necessary for the public authority to show that disclosure 'would' have an adverse effect, not that it may or could have an effect. This was considered by the Information Tribunal (the Tribunal) in *Archer v Information Commissioner & Salisbury District Council (EA/2006/0037)*. The Tribunal made the following points:

- It is not enough that disclosure should simply affect something the effect must be "adverse".
- Refusal to disclose is only permitted to the extent of that adverse effect.
- It is necessary to show that disclosure "would" have an adverse effect - not that it could or might have such effect.

- Even if there would be an adverse effect, the information must still be disclosed unless *"in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information"*.
 - All these issues must be assessed having regard to the overriding presumption in favour of disclosure.
25. The Commissioner accepts that with regard to government cases in particular, there is often an element of controversy in relation to an on-going dispute or decision-making process. He has therefore considered the importance of government being able to negotiate freely on behalf of the UK, with the EC; the timing of the request is important within this context.
26. The Commissioner is satisfied that disclosing the withheld information at this time would adversely affect the ability of the UK government and the EC to work together effectively. He further considers that disclosure of information that forms part of a case referred to the ECJ would mean the relationship between the government and the EC would become more difficult.
27. Further the Commissioner considers that the harm to relations between the UK and the EC would be probable rather than not and therefore is satisfied that disclosure would have an adverse affect.

Public interest arguments in favour of disclosing the requested information

28. The Commissioner recognises the general public interest in furthering the understanding of how safety issues surrounding sewage problems are dealt with. He further recognises the importance of accountability and transparency in this context.
29. The public authority acknowledged that there was a public interest in disclosing information relating to environmental issues which have implications for the local inhabitants in the complainant's area.
30. The complainant argued that the Agency had provided the public authority with a briefing note to *"cover up the cracks in this case"* and that this briefing note contained information that was untrue.
31. The complainant also argued that the public authority's interest had to be the same as the public interest, as it is the public who are paying the money. He further argued that it did not serve the public interest to tell lies to the EC, pretending that the terms of an EU Directive were being met.

32. The complainant proceeded to explain to the Commissioner that he could not have meant that infraction proceedings would go ahead with false information after his previous decision (see paragraph 3). He further argued that the Commissioner's previous decision had given UK authorities the confidence that they could deceive the EC and get away with it.
33. The complainant explained that he agreed with the Commissioner's assessment of the public interest test up to paragraph 41 in his previous decision, but from paragraph 42 onwards the Agency briefing note shows that the assessment was wrong. It is not within the Commissioner's jurisdiction to make findings or assess the Environment Agency's role in complying with EU legislation. The Commissioner accepts there is reasonable argument in favour of openness surrounding the infraction process in general. But he has not seen any convincing evidence (presented by the complainant or in the withheld information and background information) that could lead him to reasonably conclude that the public interest in disclosing the information is to expose clear malpractice.

Public interest arguments in favour of maintaining the exemption

34. The public authority argued that it was not in the public interest to disclose the withheld information as it discusses the infraction hearing which has been referred to the ECJ by the EC. This case has not yet been ruled upon by the ECJ.
35. In support of this, the public authority pointed to the previous decision by the Commissioner (FER0219897) as discussed above. It argued that the present case concerns information which forms part of the infraction hearing which is going to be considered by the ECJ. The public authority pointed to paragraph 37 of the decision notice in which the Commissioner considered that by *"disclosing information pertaining to live infraction proceedings there is a distinct likelihood that future relations between the government and the EC will become more difficult"*.
36. The public authority explained that it felt this argument applied equally to the information being withheld now as the infraction hearing in question had been referred to the ECJ for consideration. It went on to explain that it considered that, as the infraction proceedings were still live, the public interest was best served by ensuring an effective infraction process and that relations between the UK government and the EC were maintained.

Balance of the public interest arguments

37. The Commissioner notes that there is a presumption in favour of disclosure under the EIR as contained in regulation 12(2): *“A public authority shall apply a presumption in favour of disclosure”*.
38. The Commissioner acknowledges that in this case there is a strong public interest in disclosing the requested information. He accepts that individuals’ lives may be affected through problems associated with the pollution. He also considers that the withheld information may allow them to hold the government and other bodies to account for their actions. The information may also help to inform debate about how waste treatment should be dealt with in the future and would increase the possibility of public participation in matters that directly affect them and would allow greater scrutiny of the government’s actions.
39. However, the Commissioner also notes that the withheld information discusses the case being referred to the ECJ, in detail. The Commissioner notes that in his previous decision notice (FER0219897) he accepted that the EC had initiated a legal process to ensure that the UK government adhered to any requirements regarding the location in question. He further notes that the public authority has confirmed that this process is still ongoing.
40. The Commissioner also took into account a previous decision (FS500110720) which dealt with live infraction proceedings. He accepted the argument put forward by the public authority concerned that:
- “[t]here is a strong public interest in there being a stage of the infraction process during which the UK government and the Commission can exchange views in private and adopt different positions ...Disclosure is likely to cause entrenchment and defensiveness in respect of the positions the to sides adopted initially ... and would increase the likelihood of formal proceedings being initiated.”*
41. The Commissioner has considered the arguments for and against disclosure. He has determined that in this instance regulation 12(5)(a) is engaged and that the public interest in maintaining the exemption outweighs the public interest in disclosure. Therefore the Commissioner uphold the public authority’s application of regulation 12(5)(a).

The Decision

42. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the EIR.

Steps Required

43. The Commissioner requires no steps to be taken.

Right of Appeal

44. 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

45. 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.
46. 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 March 2011

Signed

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
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SK9 5AF

Legal Annex

Regulation 2(1)

In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“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(2)

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

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 –
 - 1. was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - 2. did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - 1. has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.