



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2009/0001
Information Commissioner's Ref: FER0138940

Heard at Care Standards Tribunal, London
On 19 May 2009

Decision Promulgated
24 June 2009

BEFORE

CHAIRMAN

ANNABEL PILLING

and

LAY MEMBERS

MICHAEL HAKE
ANDREW WHETNALL

Between

MERSEY TUNNELS USERS ASSOCIATION

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

HALTON BOROUGH COUNCIL

Additional Party

Subject matter:

EIR Reg. 2 – Definitions, Environmental information
FOIA s.12 – Cost of compliance and appropriate limit
EIR Reg. 12(4)(b) – Exceptions, Request manifestly unreasonable
EIR Reg. 12(4)(c) - Exceptions, Request formulated in too general a manner

Cases:

Glawischnig v Bundesminister fur soziale Sicherheit und Generationen 90/313/EC case C-316/01

Mecklenburg v Kreis Pinneberg-Der Landrat [1998] EC I - 3809

Bromley v Information Commissioner and the Environment Agency EA/2006/0072

Babar v Information Commissioner and the British Council EA/2006/0092

Carpenter v Information Commissioner and Stevenage Borough Council EA/2008/0046

Representation:

For the Appellant: John McGoldrick, Secretary Mersey Tunnels Users Association

For the Respondent: Richard Bailey, Solicitor

For the Additional Party: Jane Collier, Counsel

Decision

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 3 December 2008.

Information Tribunal

Appeal Number: EA/2009/0001

SUBSTITUTED DECISION NOTICE

Dated 23 June 2009

Public authority: Halton Borough Council

**Address of Public authority: Municipal Building
Kingsway
Widnes
Cheshire
WA8 7QF**

Name of Complainant: Mersey Tunnels Users Association

The Substituted Decision

For the reasons set out in the Tribunal's determination, information falling within the scope of the Request dated 6 June 2006 fell within the definition of environmental information and therefore the public authority should have dealt with it under the requirements of the Environmental Information Regulations 2004 and not the Freedom of Information Act 2000.

The Council did not comply with its duty to make environmental information available on request and did not disclose within 20 working days all the information it holds falling within the scope of the Request.

The Commissioner erred in his decision that, on the balance of probabilities, the public authority did not hold any further information that fell within the scope of the Request.

In relation to the information that has subsequently been located but has not yet been disclosed, the exceptions under Regulation 12(4)(b) and 12(4)(c) of the Environmental Information Regulations 2004 are not engaged.

The Tribunal was not provided with copies of the information sought to be withheld and has therefore been unable to consider whether the other exceptions claimed are engaged

and, if so, whether the public interest in maintaining the exception outweighs the public interest in disclosure.

Action Required

Within 20 working days from the date of promulgation of the Tribunal's determination, Halton Borough Council, to the extent that it has not already done so, is to locate and disclose to the Complainant all information it holds that falls within the scope of the Request dated 6 June 2006. This includes the relevant parts of the lists of documents appended to the Supplementary Submissions to the Tribunal's paper hearing on 19 May 2009.

If Halton Borough Council considers that any of the information that has not yet been disclosed is exempt from disclosure, it is anticipated that there will need to be a further hearing to be followed by a further determination and this is subject to Directions made separately.

Dated this 23 day of June 2009

Signed:

Annabel Pilling

Deputy Chairman, Information Tribunal

Reasons for Decision

Introduction

1. This is an Appeal by the Mersey Tunnels Users Association (the 'MTUA') against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 3 December 2008.
2. The Decision Notice relates to a request for information under the Freedom of Information Act 2000 (the 'FOIA') made to the Halton Borough Council (the 'Council') by the MTUA. The Council disclosed some information but withheld some further information on the basis that it was exempt from disclosure, relying on the exemptions in section 35(1)(a) of FOIA or, in the alternative, sections 36(2)(b) or (c) of FOIA and, in respect of some of the information which amounted to environmental information, under exception 12(4)(e) of the Environmental Information Regulations 2004 (the 'EIR'). In correspondence with the Commissioner, the Council subsequently argued that additional exceptions in Regulation 12 EIR also applied.
3. The Commissioner concluded that all the information falling within the scope of the Request amounted to environmental information, that the Council was in error in its application of the exceptions claimed, and required the disclosure of the withheld information, which amounted to 5 documents. The Commissioner accepted assurances from the Council that this represented the totality of the information it held that fell within the scope of the Request for information. The Commissioner also found that the Appellant had not met the requirements of regulation 14 of EIR but that was not an issue in this Appeal.
4. There has been on-going disclosure by the Council of information relating to the Request at all stages throughout the Commissioner's investigation and this Appeal. This has caused considerable difficulty, as well as wasted time and resources. The Tribunal has decided that this Appeal should be determined in two stages. Stage 1, which is this determination, deals with the information and issues that were before us at the hearing on 19 May 2009. Stage 2 will deal with the information not yet

located or disclosed to the Appellant. Directions have been made to deal with Stage 2. It is anticipated that there will need to be a further hearing, to be followed by a further determination. It is hoped that the Tribunal's Stage 1 determination will be of assistance to the parties in resolving or narrowing the Stage 2 issues.

Background

5. This case concerns the proposed new crossing over the River Mersey in Halton to ease growing congestion across the region. This new crossing, known as the Mersey Gateway, will be the first major estuary crossing built in the United Kingdom in the 21st Century and will be an additional crossing to the existing Silver Jubilee Bridge which is currently the only crossing on the 30 kilometre stretch of the River Mersey between the Mersey Tunnels to the west, which link Liverpool to the Wirral, and Warrington to the east. The Mersey Gateway Bridge will be 2.4 kilometres long, six lanes wide and built approximately 1 kilometre to the east of the existing Silver Jubilee Bridge. The Project will also enable modifications to be made to the existing Silver Jubilee Bridge so as to make it a local bridge with facilities for public transport, walking and cycling.
6. In March 2006 the Government approved the terms under which the Mersey Gateway Project could be funded and these made it clear that the only way in which it could be delivered was by tolling both the proposed new bridge and the existing Silver Jubilee Bridge.
7. The proposed Mersey Gateway Bridge is due to open in 2014 after a Public Inquiry. This Public Inquiry is to start on 19 May 2009 after which tenders will be invited with a view to contracts being awarded and construction starting in 2011.
8. The MTUA was formed in 2003 to campaign on behalf of users of the Mersey Tunnels, which are tolled. It became interested in the existing and proposed bridges over the Mersey and has, at various times, requested information from the

Council which operates the existing Silver Jubilee Bridge¹ and is the lead authority on plans for the new bridge.

9. At the end of 2004, following many years of discussions and planning, the Council announced it had submitted to the Government a Scheme for a new tolled bridge and it became known shortly thereafter that the existing bridge was also to be tolled for the first time.
10. The Secretary of the MTUA is John McGoldrick who made the original Request for information and conducted the Appeal on its behalf.

The request for information

11. By email dated 6 June 2006 Mr. McGoldrick, on behalf of the MTUA, wrote to the Council making a request for information under the FOIA.

“As I have had no reply to the message below, I am now seeking the following information under the Freedom of Information Act.

We want a copy of all correspondence with the DfT that deals with tolling. Will you give me some idea of the volume of this.

We also want a list of all communications (including emails) in the possession of the Council (whether the council is the addresser or the addressee or not) that refer to tolling on the proposed and/or existing bridge. When we have the list we may be making further requests to see some or all of the documents...”

12. The Council responded by letter dated 27 July 2006. It confirmed that it held information relevant to this request but refused to disclose it, claiming that the information was exempt from disclosure under FOIA by virtue of the exemptions in section 42 (legal professional privilege), section 43 (commercial interests) and section 22 (likely to be published in the future) and that the public interest in maintaining these exemptions outweighed the public interest in disclosing the information.

¹ The previous requests were partly to do with traffic volumes on the existing bridge or the economic case for another crossing.

13. By email dated 27 July 2006 the MTUA asked for an internal review of this decision.
14. The Council responded by letter dated 25 August 2006 upholding its earlier decision and setting out the public interest considerations in more detail.

The complaint to the Information Commissioner

15. The MTUA complained to the Commissioner on 20 October 2006 challenging the decision to withhold the information requested and, in particular, challenging the way in which the Council appeared to have chosen to interpret the scope of the request.
16. During the course of the investigation, the Commissioner requested the Council to explain if it had considered whether the information requested constituted environmental information within the meaning of Regulation 2(1) of the Environmental Information Regulations 2004 (the 'EIR'). The Council responded that it had not specifically considered this at the time of the request, but concluded that the information was too remote to fall within the definition and therefore did not constitute environmental information. It maintained that the relevant exemptions from disclosure were those under sections 42, 43 and 22 of FOIA but indicated that if the Commissioner concluded the request should have been governed by the EIR, the information could be withheld in accordance with the exceptions in Regulation 12(4)(d) (material in the course of completion), Regulation 12(4)(e) (internal communications) and Regulation 12(5)(b) (likely to adversely affect the course of justice).
17. The Council provided the Commissioner with copies of the withheld information and the Commissioner concluded that the information did fall within the definition of environmental information.
18. There followed a series of correspondence between the Commissioner and the Council in respect of the exceptions claimed to justify non-disclosure. While it is not necessary to outline in detail the history of this correspondence, it is relevant to note the following:

- (i) The Council did disclose some information to the MTUA and provided it with copies of certain documents;
- (ii) Further information falling within the scope of the request was also located by the Council as a result of further searches during this period;
- (iii) The Commissioner served an Information Notice on 10 July 2008 to require the Council to provide a response to outstanding questions;
- (iv) On more than one occasion during this protracted period Mr. McGoldrick confirmed the scope of his request and asserted that more documents than had been disclosed were likely to exist.

19. A Decision Notice was issued on 29 May 2008. In summary, the Commissioner concluded that, although the Council had disclosed or agreed to disclose most of the information requested, the five documents that had not been disclosed were not exempt under Regulation 12(5)(b) of the EIR and should be disclosed. These documents are identified as numbers 4, 8, 11, 13 and 14 in Appendix 1 to the Decision Notice².

20. These documents were duly disclosed by the Council to the MTUA within the period specified.

The Appeal to the Tribunal

21. By Notice of Appeal dated 3 December 2008 the MTUA appeals against the Commissioner's decision on the following Grounds:

- (1) The Commissioner erred in his decision that the documents listed in Appendix 1 represented the totality of the documents that fell within the scope of the request and that the Council held no further documents falling within the scope of the request ;

² The remaining documents on the list in Appendix 1 had been disclosed prior to the Decision Notice.

(2) The Commissioner erred in failing to obtain any explanation from the Council as to why the Council's searches did not find any relevant documents that dated prior to January 2004.

22. The MTUA does not appeal against the Commissioner's decision that the request was for environmental information within the definition in Regulation 2(1) of the EIR.

23. The Commissioner served a Reply in which it was maintained that the Commissioner was entitled to find, on the balance of probabilities, that the Council does not hold any further information that falls within the scope of the request and that the Commissioner had made proper enquiries with the Council to be satisfied that the Council had carried out a search of its documents and no further documents could be found that fell within the scope of the request.

24. The Tribunal joined the Council as an Additional Party. The Council served a Reply indicating that it did not agree with the Commissioner's decision that the EIR rather than FOIA applied to the request. It also indicated that it had properly interpreted the scope of the request for information narrowly and that, when read in context of earlier correspondence, the request was confined to information on statutory powers that might be used to implement tolling on the bridges. The Council confirmed that previously undisclosed information that it held at the time of the request that fell within its scope had been identified since MTUA had appealed to the Tribunal and, additionally, that, on the balance of probabilities, it held further information that had not yet been located. It maintained that it was not obliged to comply with the request because:

- (a) the cost of complying with the request would have exceeded the appropriate limit under section 12 (1) of FOIA; or
- (b) the request was manifestly unreasonable under Regulation 12 (4)(b) of the EIR and the public interest in maintaining the exception outweighs the public interest in disclosing the information; or
- (c) the request was formulated in too general a manner under Regulation 12(4)(c) of the EIR and the public interest in maintaining the exception outweighs the public interest in disclosing the information.

25. The Council recorded its regret that these matters were not brought to the attention of the parties earlier and, notwithstanding that the cost of complying with the request would have exceeded the appropriate limit under section 12 (1) of FOIA, the Council indicated that it did intend to carry out further searches and would notify the Tribunal of the outcome.
26. Since lodging the Notice of Appeal, we note that the MTUA has been provided with a substantial amount of additional information that has been located as a result of subsequent searches. Some of this falls within the scope of the request and some clearly does not, for example, information that post-dates the request by months and/or years. A significant amount of information was disclosed on 11 May 2009. The Tribunal was provided with an index to these bundles of information.
27. The Appeal was determined at a hearing on the papers on 19 May 2009. The Tribunal was provided in advance with an agreed Bundle of material, written submissions and reply submissions from the parties and a bundle of authorities relied upon by the Council.
28. Late on 15 May 2009 (a Friday), the Council provided a supplemental witness statement from its one witness containing schedules of documents that had been located; some of which were to be disclosed to the MTUA that day and some which were said to be exempt from disclosure under FOIA or the EIR. This was accompanied by Supplemental Submissions on behalf of the Council, which ran to 18 pages and raised additional exemptions for the first time in respect of the undisclosed information; section 42 FOIA or Regulation 12 (5)(b) EIR (documents protected by legal professional privilege), Regulation 12(5)(e) EIR (commercially sensitive information), Regulation 12(4)(d) EIR (incomplete documents) and Regulation 12(5)(f) EIR (information provided in confidence). The Council also provided a substantial further bundle of authorities. The Tribunal was unaware whether these additional items had been served on the MTUA. The Commissioner indicated that he had not had the opportunity to consider them in any detail but did not intend to serve supplemental submissions at this stage.
29. These items had been received very late and not pursuant to any Direction, either original or varied. MTUA would not have had the opportunity to make comments

had it received copies. It may well be that the Council was trying, belatedly, to provide the information it had and to put right earlier non-disclosure. If information has come to light late in the day it is right that it should be shared and we would not wish to discourage this. However the late disclosures confirm that earlier searches had been inadequate, and the earlier assurances, on which the Commissioner had relied, that all reasonable steps had been taken to find information within the scope of the request, were unreliable. The further information reaching the Tribunal took the form of lists of documents, rather than copies of the documents themselves.

30. Despite our uncertainty as to whether the additional material had been seen by all parties, we did consider these items that had been served so very late by the Council on the understanding that we might have to adjourn hearing the Appeal if we needed to receive submissions on any of the additional matters from either of the other parties.

31. The Tribunal was not provided with copies of the information not yet disclosed and in respect of which exceptions are claimed by the Council. It was not possible therefore for us to consider, in each case, whether the exception claimed is engaged and, if so, whether the public interest in maintaining the exception outweighs the public interest in disclosure. The position was unsatisfactory, but in view of the time since MTUA's initial request we decided not to adjourn the hearing on 19 May 2009 and have subsequently decided to deal with the matter in two stages.

The Powers of the Tribunal

32. The Tribunal's powers in relation to appeals are set out in section 58 of FOIA, as follows:

(1) If on an appeal under section 57 the Tribunal considers-

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

33. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether the applicable statutory framework has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

34. The questions raised in this Appeal are questions of law based upon an analysis of the facts. This is not a case where the Commissioner was required to exercise his discretion.

The questions for the Tribunal

35. The Tribunal has concluded that the relevant issues in this Appeal are as follows:

- (i) What is the scope of the request for information?
- (ii) Does the request fall to be decided under the EIR or FOIA?
- (iii) Did the Council hold further information falling within the scope of the request?

- (iv) If the request falls to be decided under FOIA, does section 12 apply?
- (v) If the request falls to be decided under the EIR, is section 12 FOIA applicable?
- (vi) If section 12 FOIA is not applicable, is the exception under Regulation 12(4)(b) EIR engaged?
- (vii) If the exception under Regulation 12(4)(b) EIR is engaged, does the public interest in maintaining the exception outweigh the public interest in disclosure?
- (viii) Is the exception under Regulation 12(4)(c) EIR engaged?
- (ix) If the exception under Regulation 12(4)(c) EIR is engaged, does the public interest in maintaining the exception outweigh the public interest in disclosure?

What is the scope of the request for information?

36. The request under FOIA was made on 6 June 2006 to Steve Nicholson, Project Director Mersey Gateway at the Council, and was phrased as follows:

“As I have had no reply to the message below, I am now seeking the following information under the Freedom of Information Act.

We want a copy of all correspondence with the DfT that deals with tolling. Will you give me some idea of the volume of this.

We also want a list of all communications (including emails) in the possession of the Council (whether the council is the addresser or the addressee or not) that refer to tolling on the proposed and/or existing bridge. When we have the list we may be making further requests to see some or all of the documents...”

37. The phrase “to the message below” related to an earlier e-mail dated 11 May 2006 which, in turn, related to additional e-mails between MTUA and Mr Nicholson.

38. The Council submit that the Request must be read in the context of the preceding correspondence and that it is limited to information on statutory powers that might be used to implement tolling on the existing Silver Jubilee Bridge and the proposed Mersey Gateway Bridge.

39. On 2 May 2006 Mr McGoldrick, on behalf of the MTUA, emailed Mr Bennett, of the Environmental and Development department of the Council, as follows:

“You may not remember but I was in contact with you about 18 months ago in connection with traffic figures on the bridge. We are interested in the proposals for the tolling of the proposed bridge and the existing bridge. There are various questions that we may want to raise, but for the moment there is just one:-

Under which legislation does the Council intend that the two bridges may be tolled?

I appreciate that this may not be a question for you, if so can you tell me who the enquiry should go to.”

40. This was not identified by either Mr McGoldrick or the Council as a request for information under FOIA. Mr Bennett responded on the same day and indicated that the enquiry should be directed to the Project Director, Steve Nicholson, and informing Mr McGoldrick that the e-mail had been passed on so that Mr Nicholson could respond directly.

41. Mr McGoldrick reminded Mr Nicholson that he had not yet received a response a week later on 9 May 2006.

42. Mr Nicholson responded on 9 May 2006 as follows:

“You may be aware that there are several options open to the promoters to seek to secure the legal authority to establish toll charges for the existing Silver Jubilee Bridge and the new Mersey Gateway Crossing. It is likely to be towards the end of this year before the statutory process is settled, where the outcome will be informed by consultation with officials at the Department for Transport.”

43. Mr McGoldrick queried this the same day:

“Thank you for the message. Are you saying that the Council does not know which powers it will use? This will be the first time in the UK that an existing free bridge will be tolled, the promoters must have already looked at this and consulted with DfT. AS the reports indicate that you will soon be given the go ahead, you must surely have decided which statutory route you will take.”

44. There was no response to this e-mail. Mr McGoldrick then made the request under FOIA on 6 June 2006.

45. The Council submits that as this “followed” the earlier correspondence querying the statutory basis for implementing tolling on both bridges, it was properly regarded as a request for information on statutory powers on tolling. Our attention was also drawn to the response given by Mr Nicholson on 6 June 2006, identifying the various statutory routes by which tolling could be implemented, and Mr McGoldrick’s response on 8 June 2006, refusing to retract the request. It is submitted that this correspondence is also concerned with statutory powers and therefore supports the interpretation to the request given by the Council.

46. MTUA identified to the Commissioner when making the complaint to him that the Council had applied an incorrect interpretation to the Request. It is submitted that although the original question on 2 May 2006 had been for the legislation under which the Council intended the two bridges to be tolled, that had changed by the time of the request under FOIA on 6 June 2006 and that the Council should have understood that the request under FOIA was on “tolling” and not only “tolling powers”. MTUA also submits that it is not reasonable to interpret a FOIA request on a narrower basis than what it actually says on the basis of an earlier question asked.

47. The Commissioner did not deal with this point.

48. We have examined both the earlier and subsequent correspondence between the MTUA and Mr Nicholson. The email of 2 May 2006 made it clear that the MTUA, which had been in touch with the Council some 18 months previously, was interested in proposals for tolling of the proposed bridge and that it may want to

raise **various** questions but **for the moment** there is just one – on statutory powers (our emphasis) . This seems to us to be reasonable notice to the Council that MTUA might subsequently ask additional or different questions.

49. Having been provided with a statement from Mr Nicholson³, it appears to us that he made an error from the outset in deciding to treat the request under FOIA as a continuation of the earlier query concerning the statutory basis for tolling the bridges.
50. We are unanimous in our view that the request under FOIA on 6 June 2006 amounted to a wider request for information on tolling rather than the narrow interpretation limiting the request to information on the statutory powers that might be used to implement tolling as applied by the Council. It may be that the request was made as a direct response by MTUA to the Council's failure to deal properly with the initial, limited question about the statutory basis for tolling.
51. The request of 6 June 2006 is clear and unambiguous; it does not refer to "that" information requested earlier, but contains specific requests for correspondence and communications (including e-mails) that refer to "tolling". MTUA acknowledged that this was a wide request and that the amount of information falling within its scope might be significant. Accordingly, the MTUA initially requested an idea of the volume and a list prior to making any further request to see some or all of the documents.
52. It is of concern that at no stage did the Council ask the MTUA to confirm the scope of the request or ask exactly what information was being sought. This appears to us to be the cause of all the subsequent difficulties that have arisen in this case and is a real failure on the part of the Council when dealing with a request under FOIA.
53. An additional issue arose as to the temporal scope of the Request. The Commissioner indicated that the relevant "cut off" date was 25 August 2006, the date of the Council's internal review; that is, the Request covers any information held by the Council up to that date but not information that was generated or came

³ Mr Nicholson was the Project Director. It does not appear that the request was dealt with by a designated FOI officer. The internal review was conducted by the Senior Best Value Advisor. It is not clear if this person was a designated or trained FOI officer.

into the Council's possession subsequently. We agree with the submission of the Council that the relevant date is the date of the Request; the public authority is obliged to disclose information held by it at the date of the Request, not the date of an internal review or any subsequent date.

Does the request fall to be decided under the EIR or FOIA?

54. If the information requested is environmental information for the purposes of the EIR, it is exempt information under section 39 of FOIA and the public authority is obliged to deal with the request under the EIR.

55. The EIR implements Council Directive 2003/4/EC (the 'Directive') on public access to environmental information.

56. "Environmental information" is defined in Regulation 2(1) as having the same meaning as in the Directive, namely any information 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 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).

57. Regulation 5(1) creates a duty on public authorities to make environmental information available upon request.

58. Regulation 12(1) (2) and (5) EIR provides:

“(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if:

- i. an exception to disclosure applies under paragraphs (4) or (5);
and*
- ii. 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.

(3).....

(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 appellant’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 the course of completion to unfinished documents or to incomplete data; or*
- (e) the request involves the disclosure of internal communications.*

59. Even if one of these “exceptions” applies, 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”. This must be assessed having regard to the overriding presumption in favour of disclosure. The result is that the threshold to justify non-disclosure is a high one.

60. By Regulation 18(1) EIR, the enforcement and appeals provisions of FOIA apply for the purposes of the EIR, (subject to the amendments of such provisions as set out in the EIR).

61. The Commissioner concluded that the withheld information he ordered to be disclosed in the Decision Notice amounted to environmental information falling within the definition in Regulation 2(1)(c) EIR. He submits that information relating to the building of a bridge and to tolling is information on a measure which is likely to affect the elements of the environment referred to in Regulation 2(1)(a) EIR, in particular the land and the landscape. He observes that building a new bridge inevitably changes the landscape and that the proposed bridge would also affect the use of land as it is intended to divert traffic away from the existing bridge and onto the new one.

62. MTUA requested information under FOIA but accepted the Commissioner’s decision that the EIR applied. Before us, MTUA maintained a neutral position as to which legislative regime applied, but did draw our attention of the position of other objectors to the proposed Mersey Gateway Project and the environmental impacts of the Scheme.

63. The Council submits that the request for information, whether interpreted narrowly or widely, falls within FOIA and not the EIR; the link between the information and the effect or likely effect on those environmental elements is not sufficiently strong

and direct for the information to constitute environmental information. Alternatively it submits that only part of the information requested falls within the definition of environmental information.

64. Our attention was drawn to *Glawischnig v Bundesminister für soziale Sicherheit und Generationen* 90/313/EC case C-316/01 which confirmed that the definition of environmental information was to be construed widely⁴, but held that the Directive is “not intended to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in Article 2(a).”

65. The Council concedes that some of the information disclosed does relate to plans being considered to introduce tolling and that tolling may affect the state of the elements of the environment if there is an effect on traffic flows. The Council submits that the definition is carefully worded in the Directive, as reflected in the EIR, and should be carefully applied. We were provided with the DEFRA guidance which, it is submitted, makes clear that, although the scope of environmental information is wide, there are limits to it and that the question of remoteness must be considered.

66. With regard to the Commissioner’s decision that to impose a toll may constitute a measure likely to affect those factors listed in Regulation 2(1)(a), as the implementation of a toll is likely to impact on volumes of traffic and therefore the environment, the Council submits that this position is too simplistic; the request, widely construed, relates to any documents referring to tolling and this would include references which have nothing to do with those measures listed in Regulation (2)(1)(c).

67. It appears to us, therefore, that there is no dispute that the Mersey Gateway Project will have a significant impact on the state of elements of the environment, such as, at least, the land and the landscape, and on factors such as emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to, such that information relating to it would fall squarely within the definition of environmental information under Regulation 2(1) of the EIR.

⁴ *Mecklenburg v Kreis Pinneberg-Der Landrat* [1998] EC I - 3809

The question for us is whether information on “tolling” of the Mersey Gateway Project would also fall within that definition.

68. We considered the statement of Mr Nicholson and, in particular, his evidence that by “March 2006, the Government approved the terms under which the Mersey Gateway Project could be funded and these made it clear that the only way in which it could be delivered was by tolling both the proposed new bridge and the Silver Jubilee Bridge.”

69. We are satisfied that tolling is an integral part to the Project and its viability. We agree with the Commissioner’s reasoning and conclude that the information requested falls within the definition of environmental information set out in Regulation 2(1)(c) EIR.

70. We note that the Commissioner submits that the difference in the legislation between FOIA and the EIR will not materially affect the decision as to whether the information should be disclosed to the public or withheld from disclosure. We see at least one significant difference in approach to considering this Appeal under FOIA and the EIR: the application of section 12 FOIA (cost of complying would exceed the appropriate cost limit) differs as there is no similar provision in the EIR.

Does the Council hold further information falling within the scope of the request?

71. The belief of MTUA that the Council holds further information falling within the scope of the request that has not been located and/or disclosed is at the heart of this appeal.

72. MTUA submits that the amount and type of material disclosed, initially and pursuant to the Commissioner’s order, cannot represent the totality of information falling within the scope of the request and, in particular, that it is “inconceivable” that no information pre-dating January 2004 on tolling exists. The Mersey Gateway Project includes the first tolling of a bridge that had previously been free to use. MTUA submits that it was most improbable that in the period from 1995, when the Project was first set up, until the time of the request under FOIA that there were

only 19 items of correspondence with the DfT (some of which were only covering notes) and 4 items of any other communications dealing with tolling. Although further information has been disclosed during the Appeal process, the MTUA maintains that there must be more information held by the Council which show how it came to be that by 2004 the Council and the DfT were working on the basis that there would be tolling on both bridges although this had not been decided at a Council meeting.

73. The Council concedes that it does, on the balance of probabilities, hold further information if the Request is to be construed widely as relating to any information referring to tolling (as opposed to the narrow construction to information on the statutory powers for implementing tolling). This is in addition to the information that was disclosed immediately prior to the hearing of this Appeal and in addition to the information that has been located but which the Council seeks to withhold on the basis of several exceptions in the EIR.

74. The Commissioner submits that, despite the fact that the Council has disclosed further information and now concedes that, on the balance of probabilities, it holds additional information falling within the scope of the request, he was entitled to rely upon the assurance he received from the Council to conclude that, on the balance of probabilities, at the time of drafting his Decision Notice, all the information relevant to the request had been located. He submits that he made repeated requests to the Council to provide sufficient information to enable him to complete his enquiries.

75. Our attention was drawn in particular to the fact that the Commissioner issued an Information Notice on the Council requiring the Council, inter alia, to “explain in as much detail as possible, the searches it has conducted to satisfy itself that it does not hold any further information which is relevant to the complainant’s request.” In its response, the Council advised that the Mersey Gateway Project team files had “been examined by the team on three occasions since the original request was received in 2005⁵. All significant electronic communications are printed off and kept on paper files so those files can be regarded as a substantively comprehensive record of communications involving the Council. The number of meetings held and

⁵ This is an error – the request was made on 6 June 2006

correspondence that was undertaken with the Department for Transport on this subject is relatively limited in the period in question. As such it is relatively straightforward to identify the correspondence in question.”

76. The Commissioner submits that he was entitled to rely upon this explanation of the searches carried out by the Council to satisfy himself, on the balance of probabilities, that reasonable searches had been carried out by the Council and that pressing the Council for further information was unlikely to have resulted in any further disclosure. He submits that it would have been *unreasonable* for him to have been expected to have pressed the Council further. In *Bromley v Information Commissioner and the Environment Agency* EA/2006/0072, a differently constituted panel of this Tribunal held that the test was whether a public authority held information on the balance of probability:

“There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority’s records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information. However, it argued (and was supported in the argument by the Information Commissioner) that the test to be applied was not certainty, but the balance of probability. This is the normal standard of proof and clearly applies to appeals before this Tribunal in which the Information Commissioner’s findings of fact are reviewed. We think that its application requires us to consider a number of factors, including the quality of the public authority’s initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere, whose existence of content point to the existence of further information within the public authority, which had not been brought to light. Our task is to decide, on the basis of our review of all these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.”

77. In *Babar v Information Commissioner and the British Council* EA/2006/0092 another Panel of the Tribunal confirmed that the search carried out by the public authority should be a reasonable one:

“There may be circumstances which indicate a significant chance of information being in existence, which will be relevant to the reasonableness of any searches undertaken.”

78. We were assisted by the agreed bundle of documents as we were able to examine the scope of the Commissioner’s investigation with the Council. We note, however, that Mr Nicholson’s evidence as to the extent of the searches made at the time of the request and during the Commissioner’s investigation is limited to searches for information falling within the narrowly interpreted scope of the request for information. There is no statement from any other individual who carried out any search during the Commissioner’s investigation.

79. Throughout the Commissioner’s investigation the MTUA made it clear to the Commissioner that the Council must hold further information. For example,

“I don’t know if you are aware that the scheme planned by the Council and the Government is unprecedented in that it will be the first time in Britain that a toll is to be placed on a currently free river crossing... I would have expected this to generate over the last four or five years or so, a fairly considerable correspondence between the Council and the Government....”

“what the Council has released so far is not even the tip of the iceberg. The tolling of the bridges is a major issue, particularly in the case of the existing bridge which if the plan goes ahead will be the first ever free bridge in Britain to be tolled. My request covered all communications in the possession of the Council (whether the Council is the addresser or addressee or not) that referred to tolling on the proposed and/or existing bridge. It is difficult to accept that there are not a lot more relevant documents than the few that the Council have so far trickled out.”

80. Mr McGoldrick, by e-mail dated 18 May 2008, drew the Commissioner’s attention to a webpage from a website operated by a promoter of the Mersey Gateway Project

⁶dating from 2001 which mentions the proposal to build a new bridge and says that it will be paid for by tolling.” He also pointed out that the few documents that had been disclosed related to a small period of time, revealed the existence of other documents or meetings for which undisclosed minutes must be held by the Council, and were confined to communications with the DfT and not others. This appears to have led to the Commissioner making specific enquiries with the Council which led to a further 6 documents being located that had been referred to in the original documents. At this stage the Council gave the assurance that “*we believe these are all the relevant documents.*”

81. The Information Notice was issued shortly after this. It is apparent from the correspondence that we have seen that not only had the Council failed to provide the information requested by the Commissioner but that such searches as had been made were inadequate. The Council appeared to be having difficulty in understanding what had been requested and in understanding its obligations under the Freedom of Information legislation.

82. The Council responded to the Information Notice and gave the explanation as to the searches it had carried out as outlined above. At this stage no explicit assurance was given that no further information was held.

83. We have considered all the information relating to the scope of the searches and we find that the Commissioner erred in his finding of fact that the Council did not, on the balance of probabilities, hold further information. This is not based solely on the fact that much more information has been located and disclosed subsequently, or on the fact that the Council now concedes it holds further information falling within the scope of the widely construed request for information. It is based on an analysis of the evidence that existed at the time of the Commissioner’s investigation.

84. We consider that the initial search and the search during the Commissioner’s investigation was very limited. Mr Nicholson looked only within the team and did not go any further. We had regard to the test of the balance of probabilities that led to the Tribunal in *Bromley* to accept that the requested information in that case did

⁶ Merseytravel, part of the Mersey Crossing Group formed in 1995

not exist, but the facts and circumstances in this case differ. The Council is not a national organisation and the information holdings at issue had not been affected by a series of reorganisations. The information requested in this case related to a contained project that the Council must have known would come under public scrutiny. The information relating to the project as a whole and the topic of tolling in particular would have been kept at no more than a few readily identifiable locations. We consider that conducting a thorough search would have been made easier by the fact that the information sought was recent, current and not historic.

85. It is clear from the paucity of the documents disclosed as well as their content that the existence of further information was more likely than not, and the Commissioner, acting reasonably, should have pressed the Council further on the assurances that were given. From the material we have seen, it appears that he started asking the right questions of the Council but did not follow these through.

86. We conclude that the Commissioner's acceptance of the assurances by the Council was unreasonable in light of the information given to him by the MTUA and that it was unreasonable to conclude that the Council did not hold any further information falling within the scope of the request.

87. The Council has made much of the fact that it has made significant disclosure during the Appeal process and that some of the information disclosed would not have fallen within the original request in any event. The implication seems to be that the Council is assisting MTUA by providing as much information as possible that it is presumed will assist with its preparation for the Public Inquiry. It is not for us to form a view on disclosure relating to a Public Inquiry, but we do not see how disclosing information that falls outside the scope of a request for information under the EIR (or FOIA) can be regarded as demonstrating that either the actual request, made three years' earlier, has been dealt with in accordance with the legislation or that the Council has complied with its duty to advise and assist under Regulation 9 EIR (or section 16 of FOIA). That duty is relevant at the time of the request.

If the request falls to be decided under the EIR, is section 12 of FOIA applicable?

88. We have concluded for the reasons given above that the request was a request for environmental information within the definition in Regulation 2(1) EIR and that, therefore, the request falls to be dealt with under the EIR and not FOIA.

89. Section 12 of FOIA is therefore not applicable.

90. Under the EIR there is no equivalent provision to section 12 of FOIA. We do not consider that we can infer such a provision under the EIR. While the provisions of the EIR imply some limitations on the scope of access rights if a request is manifestly unreasonable or formulated in too general a manner, there is no explicit cost limit in the Regulations.

If section 12 FOIA is not applicable, is the exception under Regulation 12(4)(b) EIR engaged?

91. Regulation 12 (4)(b) provides as follows:

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

....

(b) the request for information is manifestly unreasonable;

92. The Council submits that the request was manifestly unreasonable as it would place a substantial and unreasonable burden on their resources. Our attention was drawn to the guidance issued by DEFRA and to *Carpenter v Information Commissioner and Stevenage Borough Council* EA/2008/0046, the first case in which this Tribunal considered the question of when a request was vexatious under FOIA or manifestly unreasonable under the EIR and concluded that a request would be manifestly unreasonable under the EIR if it were vexatious under FOIA. We agree with the Council that it does not follow that a request is only manifestly unreasonable under the EIR if it is vexatious under FOIA; the concept is much wider.

93. While we agree that the analysis in *Carpenter* provides useful guidelines for considering whether a request is manifestly unreasonable, we do not consider that this request falls within the category of requests contemplated by this provision. The request of 6 June 2006 was not part of an extended campaign to expose improper or illegal behaviour in the context of evidence tending to indicate that the campaign was not well founded, it did not involve information that had already been provided, the nature, extent and tone of the request and correspondence was entirely proper and could not involve any suggestion that it would have a negative effect on the health and well being of anyone at the Council. The only relevant consideration that could be applied to this case is whether responding to the request would be likely to entail substantial and disproportionate financial and administrative burdens on the Council.

94. The Council submits that a request will generally be manifestly unreasonable if complying with it would exceed the appropriate limit under section 12 of FOIA; the “appropriate limits” under section 12 of FOIA can be taken to represent the threshold above which Parliament considers that a public authority should be under no obligation to comply with a request for information. It also relies upon the Commissioner’s Guidance which states that;

“...There is no separate cost limit for responses to requests for environmental information, and it may therefore be possible for some exceptionally costly requests to be considered manifestly unreasonable. However, this is a high standard, as we consider that volume and complexity alone should not be sufficient to make a request manifestly unreasonable. In such cases public authorities must first offer advice and assistance to help refine the request, and should remember that under regulation 7 the time for responding can be extended if the complexity and volume of the information justifies it.”

95. The Council appears to suggest that it would be possible to rely on the exception in Regulation 12(4)(b) even if the public authority had not complied with its duty to advise and assist the requestor. While we acknowledge that, unlike Regulation 12(4)(c), Regulation 12(4)(b) of the EIR does not specifically require compliance with Regulation 9 (the duty to advise and assist), we do not consider that a public authority can rely on this exception if it has itself acted unreasonably in dealing with

the request. In this case we consider that the Council has acted unreasonably itself by not clarifying the scope of the request, by treating the request as a request for information of tolling powers only and by failing to carry out a reasonable search.

96. Although the evidence submitted on behalf of the Council suggests that complying with the request would involve considerable time and expense, we do not consider these to be either “exceptionally costly” or disproportionate in light of the Council’s own conduct in relation to this matter. Mr McGoldrick, on behalf of MTUA, has indicated throughout that he does not want to place the Council under a financial or administrative burden which was why the initial request was for lists of information from which he *might* make further requests.

97. We are therefore satisfied that this request was not manifestly unreasonable and the exception under Regulation 12 (4)(b) is not engaged.

98. As we have concluded that the exception under Regulation 12(4)(b) EIR is not engaged, we have not gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.

Is the exception under Regulation 12(4)(c) EIR engaged?

99. Regulation 12 (4)(c) provides as follows:

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

....

(c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;

100. We note that the Council accepts that it did not comply, or even purport to comply, with regulation 9 (the duty to advise and assist) at the time of the request. Instead it is submitted that the Council has subsequently complied with this duty such that it can rely on the exception in Regulation 12(4)(c). The Council has now contacted MTUA with a view to discussing the request; this was done by letter dated 31 March 2009, almost 3 years after the request was made. We do not

consider that there can be any interpretation placed on the exception that would allow a public authority to claim it had complied with its duty under regulation 9 of the EIR in these circumstances.

101. We do not consider that the request was formulated in too general a manner; indeed we have already indicated that the request was clear and unambiguous and that the MTUA had requested lists of information at this stage in order to avoid placing too heavy a burden on the Council.

102. For these reasons, we do not find that the exception under Regulation 12 (4)(c) is engaged.

103. As we have concluded that the exception under Regulation 12(4)(c) EIR is not engaged, we have not gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.

Other Matters

104. The Commissioner submitted that the Council had failed to set out in its Reply sufficient justification for relying upon the exceptions under Regulations 12(4)(b) and 12 (4)(c) of the EIR and did not consider that he could add much more on this issue. We would like to record that we found the approach taken by the Commissioner in this regard less than helpful.

Conclusion and remedy

105. For the reasons set out in detail above, we have concluded that:

(1) the information falling within the scope of the Request dated 6 June 2006 fell within the definition of environmental information and therefore the public authority should have dealt with it under the requirements of the Environmental Information Regulations 2004 and not the Freedom of Information Act 2000;

(2) the Council did not comply with its duty to make environmental information available on request and did not disclose information which it has subsequently located and disclosed;

(3) the Commissioner erred in his decision that, on the balance of probabilities, the public authority did not hold any further information that fell within the scope of the Request;

(4) in relation to the information that has subsequently been located but has not yet been disclosed, the exceptions under Regulation 12(4)(b) and 12(4)(c) of the Environmental Information Regulations 2004 are not engaged.

106. The Tribunal was not provided with copies of the information that the Council seeks to withhold⁷ and we have therefore been unable to consider whether, in respect of each document, the other exceptions claimed by the Council are engaged and, if so, whether the public interest in maintaining the exception outweighs the public interest in disclosure. We note that these exceptions were raised very late, in the Supplementary Submissions served contrary to Directions on 15 May 2009, and that the MTUA has not had an opportunity to comment on these. The Council has conceded that on the balance of probabilities it holds further information falling within the scope of the wider interpretation of the request for information and that further searches will have to be undertaken to locate it.

107. We reiterate that the Council is not entitled to rely on section 12 of FOIA or the exceptions under Regulation 12(4)(b) and (12(4)(c) which we have found are not engaged.

108. We order the Council, to the extent that it has not already done so, to locate and disclose to the MTUA all information it holds that falls within the scope of the Request dated 6 June 2006, including the relevant parts of the lists of documents appended to the Supplementary Submissions to the Tribunal's paper hearing on 19 May 2009.

⁷ We were provided with a schedule of documents, some of which post-date the request for information.

109. If the Council considers that any of the information not yet disclosed is exempt from disclosure, it is anticipated that there will need to be a further hearing to be followed by a further determination. Directions have been made to deal with this.

Signed:

Annabel Pilling
Deputy Chairman

Date 23 June 2009