

Environmental Information Regulations 2004

Decision Notice

Date: 17 February 2009

Public Authority: Redcar & Cleveland Borough Council
Address: Town Hall
Fabian Road
South Bank
TS6 9AR

Summary

The complainant requested information from Cleveland and Redcar Borough Council relating to the construction of sea defences in Coatham. The Council disclosed some information about the project, but did not fully meet the information request. In addition, it did not confirm or deny that it held any other information in respect of this case and did not state any exemption. It did, however, provide information on the Council's complaints procedure. A second reply was sent by the Council, which in the opinion of the complainant still did not fully comply with the request, and, finally, the Council refused to disclose the requested information on the basis of the exemptions contained in section 43 of the Freedom of Information Act 2000 (the "Act"). Following further email exchanges, the Council finally wrote on 21 January 2008, informing the complainant that it had provided him with all the available information held by the Council at that time. The complainant wrote to the Information Commissioner in the belief that further information was held by the Council.

Following a review by the Information Commissioner, it became clear that the public authority had not considered the request in the correct manner, namely by applying the relevant Environmental Information Regulations 2004 (the "EIR"). At the request of the Commissioner, the Council reconsidered the request and confirmed that the pertinent consultant's report, relating to any required sea defences, has not yet been completed, and that any decision in respect of the sea defences will not be made by the Council until it has been. Having considered the relevant provisions of the EIR, and the submission of both parties, the Commissioner is satisfied that the public authority does not hold any further information relevant to the request.

The Commissioner's Role

1. The Environmental Information Regulations (the "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.

The Request

2. The complainant emailed Redcar and Cleveland Borough Council on 20 September 2007 and requested the following information under the Act:

"I would like to know if Redcar and Cleveland Borough Council are liable in any way, be it financially or otherwise, in full or in part, for the construction of the sea defence that has to be built in order for the Coatham Enclosure / Link scheme to go ahead"
3. The Council responded to this request on 9 October 2007. The reply covered a number of issues in respect of the project, but did not specifically provide the requested information. On 12 November, a second reply was sent, which in the opinion of the complainant once more did not fully comply with the request.
4. The complainant responded with a slightly different request:

"I would like to know how the council are liable for the construction defence? Is it a financial liability or are the council liable in some other way, or both? I would also like to know to what extent are they liable if they are liable financially to providing it? What percentage of the total cost are they liable for?"
5. On 5 December, the Council replied to this request, refusing to disclose the requested information on the basis of the exemptions contained in section 43 (2) of the Act.
6. In respect of the second request, the Council further replied on 3 January 2008, stating that no decision had yet been taken in respect of the *flood* defences at Coatham.
7. It is unclear whether or when the complainant requested an internal review of Redcar and Cleveland Borough Council's decision. In any event, on 21 January 2008, the Council wrote stating that a senior officer had investigated the complaint and reviewed the correspondence and information that the complainant had been given and that all of the information, which was then available, had been supplied in order to answer the question. He drew attention to possible confusion in earlier replies, stating that *sea* and *flood* defences are not the same thing and that the Council's earlier responses may have caused some misunderstanding.

The Investigation

Scope of the case

8. On 18 April 2008, 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 information that had been sent to him, in that he believed that it did not directly answer his information requests. The Commissioner has restricted himself to the original request as the second request was made after the first had been refused.

Chronology

9. The Commissioner contacted Redcar and Cleveland Borough Council on 14 July 2008. The public authority was informed of the complaint and advised that the original request should have been considered in light of the EIR. The Council was asked to review their decision in accordance with the Regulations or explain why the Council believed they did not apply. This correspondence seems to have been mislaid and, in due course, a copy was sent to the Council on 18 August.
10. The Council sought, and was granted, a short extension to reconsider the matter in light of the EIR. The public authority replied on 29 August and confirmed that they had reviewed the request in the light of the EIR. They stated that, as the planning process was still incomplete, no decision on sea defences had yet been made. That will follow the completion of the planning process, and as such, Regulation 12 (4) (a) applied.

Background

11. The history of the complaint is complex. The story of this planning application, and its timing, is interwoven with the information requests. Having stated at an early stage that the final decision on sea defences had not yet been made, both the complainant and the public authority then became involved in a series of hypothetical questions and answers. It is understandable, given the profile of the Coatham Enclosure / Links scheme, that the complainant was eager to have the fullest information available to him. In addition, it is clear the Council sought to deal with the concerns of the complainant, covering potential solutions rather than simply stating the contemporaneous position. This dialogue was not, however, about the provision of information, and needed to be handled carefully.
12. It should have been made abundantly clear to the complainant that the exchange was in respect of what may happen and, as a result, was being undertaken by the public authority outside the terms of the Act. In this instance, this lack of clarity resulted in confusion and may have created some doubt where none exists. It was only in the final letter to the Commissioner that the Council confirmed that, until the final decision has been made in respect of what the ultimate development at Coatham will be, a decision on the nature of the sea defences could not be made. As a consequence, the information is 'not held'.

Analysis

13. Throughout the history of this matter, both the complainant and the public authority had corresponded with each other on the basis of the Act.
14. After a full consideration as to whether or not the information falls within the definition of environmental information, it was apparent that the correct basis for consideration of the request was the EIR, specifically Regulation 2 (1) (a) which cover "the state of the elements of the environment, such as... natural sites including...coastal areas" and 2 (1) (c) which covers "measures...such as....plans...affecting or likely to affect the elements...referred to in (a)".
15. The investigation of the complaint was subsequently undertaken on this basis.

Exception

Regulation 12 (4) (a)

16. Regulation 12 (4) (a) states that a public authority may refuse to disclose environmental information to the extent that it does not hold that information when an applicant's request is received.
17. Following investigation by the Commissioner, it became clear that, as the planning process is not complete, the information about the sea defences is not held. Once the planning process has been completed and the land use finalised, it is the Council's intention to commission a consultant's report that will detail the defences required.

The Decision

18. The Commissioner's decision is that the public authority does not hold the information and the Regulation 12 (4) (a) applies.
19. The Commissioner also finds the public authority to be in breach of Regulation 14 (3) (a) for failing to cite Regulation 12 (4) (a) and Regulation 14 (2) for failing to confirm that the requested information was not held within 20 working days of the request.

Other matters

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

21. When addressing requests for information from the public, it is important that public authorities deal with FOI requests in accordance with the Act. It should be made clear to those requesting information that, where the public authority is seeking to provide help outside the terms of the Act, it is clearly doing so on those terms. In addition, it is important for public authorities to consider the EIR, even when the requester has sought information under FOI. Public authorities have a clear responsibility to provide assistance under Section 16 of the Act and this can be taken to advising requesters of the applicable legislation as appropriate and dealing with requests in those terms.

Right of Appeal

22. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

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

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 17th day of February 2009

Signed

**Richard Thomas
Information Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
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 records 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 2003/4EC (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;
- (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;

Regulation 12

(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 the applicant’s request is received;

Regulation 14

(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

(3) The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12 (4), 12 (5) or 13