

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 19 March 2009

Public Authority: The Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Summary

The complainant made a request for information to the Ministry of Justice on 20 May 2008. The public authority withheld the information citing the exemptions at sections 43(2) (commercial interests) and 35(1)(a) (formulation or development of government policy) of the Freedom of Information Act 2000 (the Act). The public authority was later advised by the Commissioner that the withheld information fell within the definition of environmental information in the Environmental Information Regulations 2004 (EIR) and that it should consider what exceptions from the EIR may apply. The public authority cited Regulation 12(5)(e) (commercial confidentiality). Several procedural breaches of the legislation under Regulations 5, 11 and 14 were committed by the Ministry of Justice in its handling of the request. The Commissioner also finds that the exception at Regulation 12(5)(e) is not engaged and the withheld information should therefore be disclosed.

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.

The Request

2. The complainant wrote to the Ministry of Justice on 20 May 2008 requesting that:
'you list each of the sites currently being considered for the introduction of Titan prisons?'
3. The Ministry of Justice replied on 3 September 2008, advising that the information was exempt under section 43(2) of the Freedom of Information Act as *'disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)'*.
4. The complainant wrote to the Ministry of Justice on 11 September 2008 requesting an internal review of the decision to withhold the information.
5. The Ministry of Justice responded on 13 November 2008 with the outcome of its internal review. This upheld its decision to withhold the information under section 42 of the Freedom of Information Act (in fact, it should have referred to section 43(2)) and additionally concluded that section 35(1)(a) applied. The MoJ explained this exemption is engaged in relation to the withheld information as it relates to the formulation or development of government policy.

The Investigation

Scope of the case

3. On 26 November 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 following points.
 - Disclosure is in the public interest because there is understandable public concern about the housing of offenders in local communities.
 - It is important that decisions about sites are seen by local residents to be transparent and that their views can be taken into account from the earliest stage.

Chronology

4. The Commissioner wrote to the Ministry of Justice on 29 January 2009 asking it to provide him with a copy of the withheld information. The Commissioner also gave the public authority the opportunity to submit any further submissions in support of its decision not to disclose the information.
5. The Ministry of Justice responded on 17 February 2009. It confirmed that it still wished to claim the exemptions at sections 35(1)(a) and 43(2) and provided further explanation of its reasons for applying these exemptions.

6. The Commissioner wrote back to the Ministry of Justice on 3 March 2009. He explained he considered the requested information falls within the definition of environmental information as defined by regulation 2(1) of the Environmental Information Regulations (EIR). Given the case was to be handled on the basis of the information in question being environmental information, he asked the MoJ to explain, with reference to the exceptions and public interest test set out at regulations 12 and 13 of the EIR, why the information was to be withheld from the complainant.
7. The Ministry of Justice responded on 4 March 2009, citing exception 12(5)(e) as the exception it considered applied to the withheld information under the EIR, and providing submissions similar to those it had applied within the Act.

Background to the request

8. The Secretary of State for Justice announced on 5 December 2007 a programme for building 10,500 prison places to be delivered by 2014. This was in response to Lord Carter's review of prisons '*Securing the Future*'. The programme includes building up to three large 'Titan' prisons, housing around 2,500 prisoners each.

Analysis

Procedural matters

9. The public authority processed the request for information under the Freedom of Information Act. However, during the course of the investigation, the Commissioner informed the public authority that he considers that the information constitutes environmental information and that the request should therefore have been dealt with under the Environmental Information Regulations (EIR) 2004.
10. In coming to this view, the Commissioner has taken into account Council Directive 2003/4/EC (derived from the Aarhus Convention) which is implemented into UK law by way of the EIR. The Directive sets out that one of the purposes of the legislation is to allow the participation of the public in environmental decision making at the earliest stages. This has been interpreted as meaning that information which would help the public contribute to the preparation of a plan which is likely to have an affect on the environment should be dealt with as environmental information under the EIR.
11. Regulation 2(1) of the EIR defines 'environmental information' as having the same meaning as in Article 2(1) of Council Directive 2003/4/EC:

'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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)'.

Regulation 2(1)(c)

12. The Commissioner considers the withheld information to fall within the definition of environmental information set out in regulation 2(1)(c). In his view, information relating to the potential sites of proposed new prisons is information on an activity or a plan which is likely to affect the elements of the environment referred to in Regulation 2(1)(a), in particular the land and the landscape. Building a new prison inevitably changes the landscape.
13. Accordingly, the Commissioner considers that the withheld information constitutes environmental information and should have been dealt with under the EIR.

Regulation 5(2)

14. The complainant made his request to the Ministry of Justice on 20 May 2008. However, he did not receive a substantive response until 3 September 2008, 74 working days after the date of the receipt of the request. In failing to disclose the information requested within 20 working days of receipt of the request, the public authority breached Regulation 5(2) of the EIR.

Regulation 11(4)

15. The complainant requested a review of the public authority's response to his request on 11 September 2008. He was informed of the public authority's decision on 13 November 2008, 44 working days after the receipt of the representations. In failing to respond within 40 working days of receipt of the complainant's correspondence, the Ministry of Justice breached Regulation 11(4) of the EIR.

Regulation 14

16. The initial refusal of the request was made under the provisions of the Freedom of Information Act, with exceptions from the EIR only being cited following the intervention of the Commissioner. As the complainant was not informed which of the EIR exceptions were considered to apply and was not informed of his right to make representations to the public authority under Regulation 11 or of the enforcement and appeal provisions of the Act applied by Regulation 18, the public authority failed to comply with Regulations 14(3)(a) and (b) and 14(5)(a) and (b).

Exceptions to the duty to disclose environmental information

17. Regulation 12 states that:

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

*(a) an exception to disclosure applies under paragraphs (4) or (5);
and*

(b) 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'.

18. When considering this complaint, the Commissioner has borne in mind that Regulation 12(2) states that a public authority should apply a presumption in favour of disclosure when considering a request for environmental information. Hence, when considering a complaint containing environmental information, the Commissioner applies the presumption that the information should be disclosed.
19. The Commissioner will therefore only agree that information is exempt from disclosure where a public authority has provided clear evidence that an exception applies and that the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(5)(e)

20. In this case, following the intervention of the Commissioner, the Ministry of Justice cited the exception in Regulation 12(5)(e) as its reason not to disclose the requested information.

21. Regulation 12(5)(e) states:

(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

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(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest¹.

22. There are therefore several aspects which the Commissioner has to consider in determining whether or not the exemption is engaged.

- Is the information commercial or industrial in nature?
- Is the confidentiality of the information provided by law?
- Is confidentiality required to protect a legitimate economic interest?
- Would the confidentiality required to protect a legitimate economic interest be adversely affected by disclosure?

23. The Commissioner has first considered whether the confidentiality of the information is provided by law. Confidentiality could be provided by law by the application of the common law concept of confidentiality or via a statutory restriction.

24. The law of confidence is a common law concept. A duty of confidence arises when one person (the “confidant”) is provided with information by another (the “confider”) in the expectation that the information will only be used or disclosed in accordance with the wishes of the confider. If there is a breach of confidence, the confider or any other party affected (for instance a person whose details were included in the information confided) may have the right to take action through the courts.

25. In determining whether or not a duty of confidence arises in this case, the Commissioner has considered the circumstances in which the information was provided and the nature of the information.

26. In this case, at the time the request was made, officials in the Ministry of Justice (MoJ), in conjunction with their property agents, were evaluating a number of sites to identify the best possible ones on which to build. The MoJ has not provided the Commissioner with any evidence that there is a third party involved who has expressed a concern about disclosure. Furthermore, there is nothing to indicate disclosure would result in a successful breach of confidence claim against the public authority. Rather, the MoJ's argument in favour of withholding the information is that its own interests would be prejudiced if the information was disclosed. It argues that confidentiality is required to protect its position as

purchaser and that disclosure would undermine the government's ability to procure land for the sites eventually chosen at a reasonable market value.

27. The Commissioner notes that during the time the Ministry of Justice was considering the complainant's request for information and before they had responded to him, the Ministry of Justice published its Consultation paper on the topic of Titan prisons. The Consultation paper identifies three regions of the country for potential sites on which to build one of the proposed new prisons. It also describes the factors considered important when determining the suitability of sites within these areas and the key characteristics in terms of the condition of the land.
28. Finally, the Commissioner has considered whether or not there is a statutory restriction in this case. In this respect, the Ministry of Justice has not provided any evidence to the Commissioner to show that an explicit statutory restriction applies and it is not obvious to the Commissioner that there would be any such restriction.
29. In the absence of any evidence of a common law or statutory restriction, the Commissioner does not find the confidentiality of the withheld information is provided by law. Therefore the Commissioner does not find the exception engaged. Consequently, he has not found it necessary to consider whether or not the public interest in maintaining the exception outweighs the public interest in disclosing the information.

The Decision

30. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.
31. In failing to disclose the requested information within 20 working days of receipt of the request, the public authority breached Regulation 5(2) of the Environmental Information Regulations (EIR). In failing to reconsider the request within 40 working days the public authority breached Regulation 11(4) of the EIR. In failing to inform the complainant which of the EIR exceptions applied and not informing him of his right to make representations to the public authority or of the enforcement and appeal provisions of the Act, the public authority failed to comply with Regulations 14(3)(a) and (b) and 14(5)(a) and (b). The Commissioner also finds that the exception at Regulation 12(5)(e) is not engaged and the withheld information should therefore be disclosed.

Steps Required

32. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - disclose the requested information to the complainant.
33. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

34. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

35. Either party has the right to appeal against this Decision Notice to the 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

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 19th day of March 2009

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annexe

The Environmental Information Regulations

Regulation 2 - Interpretation

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);

“historical record” has the same meaning as in section 62(1) of the Act;
“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

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

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and
“working day” has the same meaning as in section 10(6) of the Act.

Regulation 5 - Duty to make available environmental information on request

Regulation 5(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 5(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 5(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

Regulation 5(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

Regulation 5(5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to the standardised procedure used.

Regulation 5(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

Regulation 11 - Representation and reconsideration

Regulation 11(1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

Regulation 11(2) Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

Regulation 11(3) The public authority shall on receipt of the representations and free of charge –

- (a) consider them and any supporting evidence produced by the applicant; and
- (b) decide if it has complied with the requirement.

Regulation 11(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.

Regulation 11(5) Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of –

- (a) the failure to comply;
- (b) the action the authority has decided to take to comply with the requirement; and
- (c) the period within which that action is to be taken.

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

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

Regulation 14 - Refusal to disclose information

Regulation 14(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

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.

Regulation 14(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; and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

Regulation 14(4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

Regulation 14(5) The refusal shall inform the applicant –

- (a) that he may make representations to the public authority under regulation 11; and
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.