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

Decision Notice

Date: 19 May 2011

Public Authority: **London Borough of Hillingdon**
Address: **Civic Centre**
High Street
Uxbridge
Middlesex
UB8 1UW

Summary

The complainant requested a copy of a scoping note relating to a proposed change in water level management at a lake known as "Ruislip Lido" from the London Borough of Hillingdon ("the Council"). The Council refused to disclose the scoping note on the basis that it was excepted under regulation 12(4)(d) of the Environmental Information Regulations 2004 ("the EIR") and the public interest favoured maintenance of the exception. The Information Commissioner ("the Commissioner") investigated and found that although the exception was engaged, the public interest in disclosing the information was not outweighed by the public interest in maintaining the exception. The Commissioner requires the Council to disclose the scoping note within 35 days. He finds that the Council breached regulation 5(1) and 5(2) of the EIR as it failed to make the requested information available on request within the statutory time for compliance.

The Commissioner's Role

1. 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 Commissioner. In effect, the enforcement provisions of

Part 4 of the Freedom of Information Act 2000 ("the FOIA") are imported into the EIR.

The Request

2. On 13 May 2010, the complainant wrote to the Council and asked for information in the following terms:

"I understand from the Friends of Ruislip Lido that a report was recently prepared for the Council by independent engineers covering such matters as water quality and flood risk at the Lido. [name] LBH Project, Events and Improvement Officer Planning and Community Services who holds this document has described it as a scoping report. Could you please let me have a copy of this report".

3. The Council responded on 8 June 2010. It stated that the information was excepted under regulation 12(4)(d) of the EIR and that the public interest favoured maintenance of the exception.

4. The complainant wrote to the Council on 8 June 2010 and 10 June 2010 requesting an internal review of the refusal.

5. On 30 June 2010, the Council replied and stated that it wished to maintain its position.

The Investigation

Scope of the case

6. On 8 July 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the Council had correctly withheld the information he had requested.

Chronology

7. On 10 September 2010, the Commissioner sent a standard letter to the Council.

8. The Council replied on 13 September 2010 and provided a copy of the withheld information along with supporting arguments. It indicated that

it was its intention to publish the scoping report once an assessment had been made by the Environment Agency. It confirmed that it was expecting this in mid to late September 2010.

9. On 16 September 2010, the Commissioner wrote to the Council. He set out his provisional view that the information should be disclosed in this case.

10. On the same day, the Commissioner wrote to the complainant to set out his understanding of the complaint.

11. On 17 September 2010, the complainant telephoned the Commissioner to confirm that the Commissioner had understood the details of his complaint.

12. On 15 October 2010, the Council responded to the Commissioner. The Council explained that it was committed to publishing the information once a final assessment had been received from the Environment Agency. It explained that this had been delayed and was expected by the end of the month. The Council added that it wished to maintain its position that the information had been correctly withheld.

13. On 1 November 2010, the Commissioner telephoned the Council to enquire about whether the Environment Agency had completed its assessment. During this conversation, the Commissioner explained that he did not consider that the Council had provided sufficient arguments to justify its position. At this point, the Council indicated that it wished to make some further submissions.

14. On 5 November 2010, the Council elaborated upon its arguments in support of its use of the exception and its application of the public interest test. The Council explained that it was still awaiting confirmation from the Environment Agency about when its report was likely to be published.

15. On 9 November 2010, the Commissioner telephoned the Council for an update. The Council explained that the Environment Agency had confirmed that it did not anticipate publication of its report until at least December 2010.

Analysis

Substantive Procedural Matters

16. The Commissioner is satisfied that the scoping note in question constitutes "environmental information" under the EIR. It concerns the work to be undertaken to complete a Flood Risk Assessment and an Environmental Impact Report as a result of proposed changes to the water level management at a lake. The Commissioner accepts that this information therefore relates to plans affecting the elements and factors listed in regulation 2(1)(a) and (b). It therefore falls within the scope of regulation 2(1)(c).

Exception – 12(4)(d) Incomplete information

17. The exception under regulation 12(4)(d) specifies that information is excepted if it relates to material which is still in the course of completion, to unfinished documents or to incomplete data.

18. In its initial responses to the complainant, the Council explained that the scoping note was commissioned by the Council to identify work required in respect of carrying out a Flood Risk Assessment and an Environmental Impact Assessment. In other words, the document was created in order to inform and define later pieces of work. It stated that the scoping note did not include the latter assessments and as these assessments were ongoing pieces of work, the scoping note relates to material which was still in the course of completion. It explained that once the final report from the Consultant Engineers based on the scoping note was available, it must be submitted to the Environment Agency for assessment. Once this process is complete, the Council stated that it is its intention to publish the information.

19. In a later submission to the Commissioner, the Council pointed out that the scoping note was marked "Final Draft" and was in fact, only held as a draft at the time of the complainant's request on 13 May 2010. It stated that the draft is dated 19 April 2010 and the completed version dated 14 May 2010 was sent to the Council by the consultants on 15 May 2010. The Council advised the Commissioner that as far as it can tell there were only minor typographical alterations.

20. The Commissioner expressed to the Council that he was not persuaded that the scoping note could be said to be incomplete material simply because it identified the need for further work. The Commissioner believes that when considering the application of this exception, the focus should be on the information itself and the "completeness" of

that information, rather than on the stage other related information has reached in the drafting process. Therefore, in this case, the fact that the Council was undertaking or intended to undertake further work based on the scoping note is not sufficient to support an argument that the scoping note itself was incomplete.

21. Nevertheless, the Commissioner accepts that at the time of the request, 13 May 2010, the scoping note was only held in a draft form, dated 19 April 2010, albeit that there were only a few minor later alterations. He therefore accepts the Council's position that the request in this case related to information that was still in the course of completion and that regulation 12(4)(d) was engaged. This position is arrived at in line with the Information Tribunal decision as stated in DfT/ICO (EA/2008/0052). At paragraphs 67 – 79 of that decision, the Tribunal accepted the point that:

"*the Draft Report clearly constituted an unfinished document at the time of the request and still remains so following the publication of a final version".*

22. As regulation 12(4)(d) is a qualified exception, the Commissioner went on to consider the application of the public interest test to the scoping note.

Public interest arguments in favour of disclosing the requested information

23. Some weight must always be attached to the general principles of achieving accountability and transparency through the disclosure of information held by public authorities. Regulation 12(2) of the EIR itself specifically acknowledges that there should be a presumption in favour of disclosure. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities. In the case of environmental information, this can eventually lead to a better environment. The Council explicitly recognised this general public interest in its responses to the complainant.

24. There is also a strong argument that there is a public interest in exposing draft positions so that the public is given a fully informed picture of the policy making process, promoting transparency and accountability in relation to the activities of public authorities.

25. The Commissioner would add to this the fact that the information clearly is part of a major programme of works being undertaken by the Council to improve access and facilities at the lake. Works involving the lake could have a significant impact on the environment and could

affect people's lives. There is a particularly strong public interest in the public having access to information concerning potential works such as these.

26. Unfortunately, the council did not provide specific public interest factors that could be considered in favour of disclosure.

Public interest arguments in favour of maintaining the exemption

27. The Council put forward the following arguments in favour of maintaining the exception:

- The Council is committed to publishing the scoping note once the Environment Agency has completed its assessment.
- Despite having acknowledged the public interest in transparency surrounding the decision-making of public authorities, the Council went on to suggest that disclosure of the scoping note by itself would not assist in improving the transparency of the decision-making process because without the completed assessment from the Environment Agency, it provides no information on the decision-making of the public authority.
- Disclosure of the scoping note would be detrimental to any consultation as the public will not have access to all relevant information and this may create a misleading impression of the Council's intentions.
- Disclosure could result in unwarranted confusion and panic amongst members of the public, especially those who may be affected by any possible flood risk.
- The Council would have to set aside already sparse resources in order to deal with public enquiries and it would not be able to handle these enquiries properly without the completed assessment from the Environment Agency.

28. The Commissioner would also add that there is a public interest in protecting safe space (thinking space) and drafting space inherent in regulation 12(4)(d). Applying the same principles as are accepted in relation to policy development, there is a public interest in enabling officials to get on with the job in hand without having to defend a preliminary position, or comment externally on what are only drafts and may not reflect fully formulated or agreed positions.

29. There is also a public interest argument inherent in 12(4)(d) in favour of avoiding un-adopted positions being exposed to public scrutiny even after drafting is complete, so as to avoid public resources being expended in explaining or justifying draft documents or interim positions.

Balance of the public interest arguments

30. Once the final version of a document is completed, the Commissioner's view is that generally, any prejudicial effect relating to the sensitivity of the information included in a draft will be likely to reduce. This factor is of relevance here as the council has stated that in their view, the scoping note was actually finalised the day after the request was received, before the request was responded to. The Commissioner will take into account how recently the final version of the document was completed and how recently the draft was produced. In general, the more time that has passed since the finalisation of the information, the more the public interest in maintaining the exception is likely to have diminished.

31. The Commissioner appreciates that regulation 12(4)(d) is specifically designed to recognise that there are occasions when the public interest in not disclosing draft material is stronger than the public interest in making the disclosure. Having regard to the circumstances of this case, the Commissioner was not of the view that this was the case here.

32. As explained in paragraph 20 of this Notice, the Commissioner did not accept that the material was incomplete based on the fact that there was future work to be carried out. He has therefore focused on the completeness of the actual scoping note itself. The Council has conceded that following the request, there were only minor alterations. It is therefore clear that the scoping note was largely complete by the time of the request. In the Commissioner's view, this diminishes the public interest in withholding the draft significantly.

33. Additionally, the Commissioner would add that having considered the nature of the information contained within the scoping note, he was not persuaded that significant weight should be attached to the Council's fears that disclosure would cause undue anxiety, panic and resource intensive activity. The Commissioner accepts that disclosure may result in some enquiries over and above those that the Council may already receive in relation to the proposals however he does not accept that the enquiries would be beyond what the Council should be able to deal with appropriately.

34. The draft scoping note also contains no un-adopted strategies or alternatives that were subsequently changed, providing further weight towards disclosure as the promotion of transparency and accountability in relation to the activities of public authorities are strong factors in favour of disclosure. The council has further placed weight on the fact that the final assessment, being carried out by the Environment Agency, has yet to be completed. The Commissioner is of the view that

this is a misconception as it moves the focus of the consideration away from the requested information. The scoping note has been drafted to inform the direction of the report, so the report cannot be said to have a direct influence on the scoping note.

35. Overall, the Commissioner does not accept the position assumed by the Council throughout his investigation that there was little or no value in the disclosure of the scoping note prior to the Environment Agency's assessment. The scoping note concerns plans being considered by the Council for major development works in the area and there is therefore a strong public interest in disclosure. For the reasons given above, the Commissioner's view was that the public interest in maintaining the exception did not outweigh the public interest in disclosure.

Procedural Requirements

36. The Commissioner considers that the Council breached regulation 5(1) and 5(2) of the EIR by failing to disclose a copy of the scoping note on request within the statutory time for compliance.

The Decision

37. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the EIR because it incorrectly determined that the public interest in maintaining the exception under regulation 12(4)(d) outweighed the public interest in disclosing the information. It therefore breached regulation 5(1) and 5(2).

Steps Required

38. The Commissioner requires the public authority to take the following steps to ensure compliance with the EIR:

- Disclose to the complainant a copy of the withheld scoping note

39. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

40. 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

41. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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

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 sent.

Dated the 19th day of May 2011

Signed ……

Gerrard Tracey
Principal Policy Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Environmental Information Regulations 2004

Legal Annex

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

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 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 the 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(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or