

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

Decision Notice

Date: 21 September 2011

Public Authority: Northumberland County Council
Address: County Hall
Morpeth
Northumberland
NE61 2EF

Summary

The complainant made a number of requests for information to Northumberland County Council ("the council") relating to proposals to install bus stops. In relation to the majority of the points in the request, the council did not clearly state whether or not it held recorded information of the nature requested. Instead, it provided a number of written statements. In relation to one request, the council provided a copy of part of a document. When the Commissioner investigated, the council clarified that it did not hold the majority of the requested information, although it did identify that it held a limited amount of additional information which it agreed to provide the complainant. The Commissioner found breaches of 5(1), 5(2), 14(2) and 14(3)(a) of the EIR. He requires no steps to be taken.

The Commissioner's Role

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

1. The complainant requested information on 10 January 2011 in the following terms:

"This is a request for information under the Freedom of Information Act 2000.

Northumberland County Council's July 2009 Proposal for the Installation of Bus Stop pole and Clearway Markings adjacent to 238 and 240A Western Way, and Installation of Bus Stop pole, and Bus Stop Clearway Road markings with Standing Area opposite 240A and 242 Western Way, Darras Hall Northumberland.

and

*Northumberland County Council's proposal 24 November 2010, for Combined North/South Bus Stop (opposite 242 Western Way NE20 9ND) without Road Markings
Council Spending Without Evidence of Need*

In her letter, dated 02/12/11, Margaret Field Public Transport Projects Officer NCC, states that public money is spent by Northumberland County Council upon demand by Go North East without any requirement for evidence of need. Ms Field indicates that there is no limit on this commitment provided the perception for the for-profit partner is that any proposal is 'connected with the bus service'. This is said to be 'in line with policy and procedures'.

Request for information (1) Would you please let me know the procedure by which the use of monies in this way:

1.1) was able to be scrutinised in 2009/10;

1.2) is able to be measured against performance data in 2011

Denial of Responsibility for Risk Assessment

In her letter dated 03/08/09 Margaret Field (NCC) states 'All bus stops are subject to risk assessment undertaken by the local the [sic] bus operator'. In his letter dated 01/10/10 Ian Jopling Highways Policy Team Manager (NCC) states: 'The completion of a risk assessment by the bus operator is not considered to be necessary for the County Council to make a decision on this proposal'. To the laymen, there may appear to be a tension between these two statements.

Request for Information (2) Would you please let me know which of the above statements (if either) accords with Northumberland County Council's policies and procedures.

In response to a request for a copy of the risk assessment of the originally proposed site (and the reasons for deviating from this proposal), Ian Jopling Highways Policy Team Manager NCC, in his letter, dated 7 August 2009, states 'Northumberland County Council does not

hold information of the description specified in the request. I advise that you contact Go Ahead North East for this information'.

In his letter, dated 14 December 2010 Andrew Gamblin (Customer Service Manager Go North East) states that it is the responsibility of '...local highway authority, [to undertake] the relevant road safety and risk assessments,...

It has therefore been confirmed that neither the Bus Company nor Northumberland Council accepts responsibility for the risks associated with the County Council's proposals.

Request for Information (3) Please let me know who was responsible for the risk assessment of the July 2009 proposal above.

Request for information (3.1) Please let me know who was responsible for the risk assessment of the November 2010 proposal above.

Accountability and Failure to Keep adequate Records

...Request for Information (4) If foreseeable serious road traffic accidents do result from the proposals, who will be accountable for the risk assessment element(s) of the proposal(s)?

Request for Information (4.1) How will such accountability be established in the light of Northumberland County Council's failure to keep adequate records (in respect of risk assessments) and total reliance on remembered conversations which Council Officers claim took place between un-named individuals in 2009?

No Evidence of Support for Specific Proposals

...Request for Information (5) Would you please let me have the records/evidence of the consultation with local residents which demonstrated local support for Northumberland County Council's July 2009 Proposal for the Installation of Bus Stop pole and Clearway Road Markings adjacent to 238 and 240A Western Way, NE20 9ND and Installation of Bus Stop pole, and Bus Stop Clearway Road markings with Standing Area opposite 240A and 242 Western Way NE20 9NF and Northumberland County Council's Proposal 24 November 2010, for Combined North/South Bus Stop (opposite 242 Western Way NE20 9ND) Without Road Markings

Failure to provide Information Reasonably Requested

In his letter dated 01/10/09 Ian Jopling, Highways Policy Team Manager (NCC), in response to a letter asking for a copy of the bus operator's risk

assessment and the reasons for deviating from the original proposal, states:

'...a copy of the bus operator's risk assessment is not held by the County Council. All risks associated with the originally proposed and revised sites were discussed by the bus operator and the County Council representative during the site meeting. A copy of an annotated site plan was provided to you as part of the Council's response to your FOI request'.

I have enclosed a copy of the annotated site plan.

Request for Information (6) Would you please me [sic] know where on the plan and/or the notes there is evidence of consideration having been given to the safety issues of the proposal.

Request for Information (7) Would you please let me have contact details for the people who discussed risk assessment 'during the site meeting'.

Records and Evidence Relevant to November 2010

The NE20 9ND bus stop proposal has been radically altered since 2009.

Request for Information (8) Would you please let me have, in respect of the dangerous November 2010 proposal, records of

8.1 consultation with residents affected by the proposal (including residents who moved into affected properties subsequent to the 2009 consultation process);

8.2 records of site visits (including dates and contact details of those taking part):

8.3 records of risk assessments; and.

8.4 records of consultation with Ponteland Town Council.

Rational Decision Making

In his letter, dated 23/12/2010, regarding 'operational factors [and] passenger convenience' (i.e. the need or otherwise for bus stops) Ian Jopling Highways Policy Team Manager (NCC) states:

'A verbal request from the bus operator, stating that additional bus stops would be of benefit to passengers, is considered appropriate for the Council to develop a proposal. The Executive Member for Highways & Transportation was presented with information and [sic] on which to make a rational decision on the proposal'.

Request for Information (9) Would you please let me have the information which was presented to The Executive Member for Highways & Transportation regarding risk assessment for the proposal and regarding operation factors/passenger convenience (i.e. need for the proposal).

Failure to Provide, In Reasonable Time, Information Requested

In his letter dated 0708/09 Mr Jopling refused to give information regarding Northumberland County Council's Comprehensive Area Assessment. Following a second request for this information, Mr Jopling, in his letter dated 23/12/10, advises that the 'CAA regime has now been abolished'.

Request for information (10) Would you please let me have details of the legislation guidance and/or policy which prevented Mr Jopling from providing information on a regime which was current and yet empowers him to provide information on its being no longer applicable".

2. The council responded to the request on 7 February 2011. The council's response indicated that some of the information requested was not held, although this was not always explicitly stated. The Council said that it did not consider that points 4 and 4.1 represented valid requests for information. It provided written responses to the remaining requests.
3. On 8 February 2011, the complainant requested an internal review.
4. The council completed its internal review on 7 March 2011. It mainly stated that it considered that the previous responses provided had been appropriate. However, with reference to the information requested under the heading "No evidence of Support for Specific Proposals", it added that its response should have stated that the responses to the consultation contain personal details and cannot therefore be disclosed.

The Investigation

Scope of the case

5. On 16 March 2011, the Commissioner received a complaint from the complainant. Having reviewed the correspondence received from the complainant, the Commissioner considered that the precise nature of the complaint was not clear. It was not, for example, apparent whether the complainant wished to complain about the response received in respect of all of the points of the request or only some of them. The Commissioner therefore invited the complainant to identify which points he wished to complain about and to explain why he considered that the

matter had not been appropriately handled. The complainant provided a specific complaint in relation to some of the individual points as follows:

- Point 1.1 and 1.2 - The complainant alleged that the council had failed to comply with section 16 of the FOIA
 - Point 2 - The complainant alleged that the council had failed to comply with section 16 of the FOIA. He also said that he did not accept the council's response because it was inaccurate, unreasonable, irrational and not the information he requested.
 - Point 3 and 3.1 – The complainant said that the council had not made it clear whether it holds the information. If it was not held, the complainant had not been provided with adequate information to justify that position. The complainant also alleged that the council had breached section 16 of the FOIA.
 - Point 4 and 4.1 – The complainant does not maintain that these are valid requests.
 - Point 5 – The complainant alleged that the council had not provided the information requested.
6. The complainant did not make a specific complaint in relation to the remaining individual points. However, the Commissioner noted that the complainant had, in earlier correspondence, referred to his dissatisfaction with the council's refusal to provide information he had requested. Therefore, the Commissioner will also consider whether the council provided all the information requested in points 6 to 10.
7. For clarity, the Commissioner has not ordered any steps in relation to information that has either already been provided to the complainant or which the authority has agreed to disclose informally. This is because these matters are considered to have been informally resolved.

Chronology

8. Between 13 May 2011 and 18 August 2011 the Commissioner exchanged correspondence with the parties to further his enquiries and clarify the nature of the complaint.

Analysis

Substantive Procedural Matters

Is the information environmental?

9. Regulation 2(1)(c) of the EIR provides that any information on plans or activities affecting or likely to affect the elements of the environment will be “environmental information”. Environmental information must be considered under the EIR rather than the FOIA. Having considered the complainant’s request, the Commissioner decided that it should have been considered under the EIR as the information relates to plans to install a new bus stop infrastructure. These proposals are likely to affect the elements and factors set out in regulation 2. In particular, the proposals are likely to affect the land and generate more noise in a particular area.

Exception – Regulation 12(4)(a)

Did the council hold the information requested at points 2, 3 and 3.1, 5 and 6 to 10?

10. Regulation 12(4)(a) provides an exception to the duty to disclose information under regulation 5(1) if the requested information was not held at the time of the request.

Point 2

11. When the council responded to point 2, it said that both of the statements accord with the council’s policies. When the Commissioner asked the council to review its response, the council said that it did not in fact hold recorded information which it could use to answer the question. It explained that when a new bus stop is created, the county council, as highway authority, must satisfy itself that a bus stop will not create a significant road safety risk. Comments from the local bus operator are also requested to include highway aspects from a bus service operational point of view. At the same time, the bus operator undertakes its own separate risk assessment. The council explained that its own risk assessment is enough to enable it to make a decision on the proposal and that is why it said that a bus operator risk assessment is not necessary for it to make a decision.
12. The council explained that it does not hold any written policies on the issue. It said that it had conducted searches to check that the information was not held including consultation with relevant staff. It has also confirmed that it had never held this information and that it had not been deleted, destroyed or mislaid. In view of the response

provided by the council, the Commissioner accepts that on the balance of probabilities, the requested information was not held.

Point 3 and 3.1

13. When the council initially responded to this request, it said that the completion of a formal risk assessment was not considered to be necessary. When the Commissioner asked the council to review its response, it conceded that it had not addressed the specific request for information that had been made. It confirmed that it did hold recorded information showing who carried out the risk assessment. However, it said that it wished to rely on section 13(1) of the EIR. Following a telephone conversation with the Commissioner, the council conceded that it had probably already made the complainant aware of the name of the officer concerned through its previous correspondence. The council then confirmed that it was willing to disclose this information to the complainant.

Point 5

14. In its initial response, the council said that evidence of consultation had already been provided to the complainant on 3 August 2009. It said that consultation is not necessary for the council to make a decision on the November 2010 amendment. In its internal review, the council added that the response should have stated that the responses to the consultation contain personal details and cannot therefore be disclosed.
15. When the Commissioner asked the council to review its response, the council changed its position and clarified that the information requested was in fact not held. The council said that it had provided the complainant with all the evidence from the consultation responses. It could be seen from that response that there were no expressions of support for the proposal. The council said that one resident stated that they had no objection but it had not classified this as an expression of support and in any case, that information had already been provided to the complainant.
16. The council said that all of the consultation responses had been sent to one case officer. It had checked those responses to ascertain that there were no expressions of support for the proposals. It also confirmed that it had never held this information and that it had not been deleted, destroyed or mislaid. In view of the response provided by the council, the Commissioner accepts that on the balance of probabilities, the requested information was not held.

Point 6

17. When the council responded to this point, it said that it had already provided a copy of the annotated plan and that this provides a record of the issues discussed at the site meeting.
18. The Commissioner confirmed with the council that the information requested was not held because the annotated plan does not include evidence of any consideration being given to the safety proposals. This would clearly be apparent to the complainant already, as he has received a copy of the plan concerned.

Point 7

19. When the council responded to this point, it referred to representatives from the local bus operator and it provided the name of a council employee. When the Commissioner asked the council to review its response, the council said that it had confirmed the name of the council officer who attended the meeting. It said that it had not been necessary to provide these contact details as the complainant was already aware of these based on previous correspondence. It said that two representatives of the bus operator had also attended the meeting. It said that it held the details of one of these individuals in a recorded form because it had been recorded in the council's officer's diary and it was willing to provide this information to the complainant.
20. However, it was not known at that time that a second representative would also be attending and information about them was therefore not held in a recorded form. The council confirmed that it had conducted relevant searches of electronic information and other correspondence to check that this information was not held. It confirmed that it was not aware that this information had been deleted, destroyed or mislaid. On the balance of probabilities, the Commissioner accepts that the council did not hold recorded information relating to one of the attendees at the meeting.

Point 8 to 8.4

21. When the council responded to this point, it said that further consultation was not necessary for the council to make a decision on the November 2010 amendment. It also said that further site visits, risk assessments and consultation were not necessary. When the Commissioner asked the council to review its response, the council said that it appreciated that this did not represent a proper response in accordance with the EIR. It said that it should have said that it did not hold the information.

22. The council explained that the complainant had asked for information relating to a "revised proposal". It said that the council had started to install the approved bus stop infrastructure in November 2010. The work was stopped following threatening behaviour from a resident. A decision was then taken to install the bus stop pole and flag on the southbound side of Western Way only. This was designed "Use both sides of the road" for bus passengers. This decision was made to minimise the impact on local residents. As the proposal for the southbound stop on Western Way was unchanged, the council determined that it was not necessary to conduct any further site visits, risk assessments or consultation. The council said that it could have explained to the complainant that the signage of "use both sides of the road" applies to pedestrians only. It said that the complainant may have understood this signage to apply to vehicles which may explain why he believes that the original proposal was "radically altered" and the new proposal is dangerous.
23. The council confirmed that it had conducted searches to check that it held no information falling within the scope of these requests, including discussion with officers in the council's Integrated Transport Unit and Traffic Team. It said that it was not aware that any relevant information has been deleted, destroyed or mislaid. The Commissioner was satisfied that on the balance of probabilities, the information requested by the complainant was not held.

Point 9

24. When the council responded to this point, it provided a copy of the information that was provided to the Executive Member for Highways and Transportation under a particular heading: "Implications Arising Out of the Report". The council subsequently identified that there was other relevant information contained within this report that it had not provided to the complainant. It said that this included information relating to road safety and traffic management. It said that it had written to the complainant in July 2011 to apologise for this error and it had included a full copy of the report.
25. The council said that it had conducted searches to check that no further information was held. It has also confirmed that it had never held this information and that it had not been deleted, destroyed or mislaid. In view of the response provided by the council, the Commissioner accepts that on the balance of probabilities, the requested information was not held.

Point 10

26. The council explained that it did not hold any recorded information falling within the scope of the request because there was no legislation, guidance or policy which would have prevented the council from providing information that had been requested by the complainant. It said that it had conducted searches to check that the information was not held including discussion with its legal section. It has also confirmed that it had never held this information and that it had not been deleted, destroyed or mislaid. In view of the response provided by the council, the Commissioner accepts that on the balance of probabilities, the requested information was not held.

Regulation 9 – Advice and assistance

27. In relation to points 1.1, 1.2, 2, 3 and 3.1 the complainant alleged that there had been a breach of section 16(1) of the FOIA. This breach relates to the public authority's obligations to provide reasonable advice and assistance. As the Commissioner has found that the request should have been considered under the terms of the EIR, there can be no breach of the FOIA. However, the Commissioner considered that it was appropriate to consider the most similar breach under the EIR in accordance with regulation 9.
28. Regulation 9 provides that a public authority shall provide advice and assistance so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants. The provision of advice and assistance is covered in part III of the regulation 16 code of practice under paragraphs 8 to 23. The code of practice is called "Code of Practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004" (SI 2004 No. 3391) and it was issued in February 2005.
29. The complainant alleged that there had been a breach of the council's duty to provide reasonable advice and assistance but he did explain to the Commissioner why he believed there had been a breach of this duty. The Commissioner is, however, mindful of the lack of focus that the authority brought to bear on the matter when the request was made and appreciates how this may have fuelled the complainant's disquiet about the way the request was handled. However, the catalogue of errors identified, detailed in the 'Procedural Requirements' section below, evidence a failure in the basic application of the EIR, rather than a wilful attempt to confuse matters. As the Commissioner has identified specific breaches in relation to the responses he has not considered it necessary to look further into Regulation 9, but would expect an improved performance in future.

Procedural Requirements

30. A public authority is obliged under the EIR to respond to a request within 20 working days. This did not happen on this occasion and the Commissioner has therefore found a breach of regulation 5(2).
31. Under the EIR, when a public authority does not hold information it should cite the exception under regulation 12(4)(a). The Commissioner notes that the council failed to do this in relation to points 1.2, 2, 5, 6, part of point 7, points 8 to 8.4, and point 10. This was a breach of regulation 14(2) and 14(3)(a) of the EIR.
32. In relation to point 3 and 3.1 and points 7 and 9, the council failed to provide all of the requested information it held and therefore breached regulation 5(1) and 5(2) of the EIR. The authority has agreed to provide the outstanding information.

The Decision

33. The Commissioner's decision is that the public authority complied with the EIR in the following respects:
 - Other than in respect of points 3 and 3.1 and points 7 and 9, the council did not breach its obligations to provide the recorded information that it held.
 - The council did not breach its obligation to offer advice and assistance under regulation 9 of the EIR in relation to points 1.1, 1.2, 2, 3 and 3.1.
34. However, the Commissioner found that the public authority did not comply with the EIR in the following respects:
35. The council did not respond to the request within 20 working days and therefore breached regulation 5(2).
 - In relation to points 1.2, 2, 5, 6, part of point 7, points 8 to 8.4, and point 10, the council breached its obligations under regulation 14(2) and 14(3) to cite the exception under regulation 12(4)(a) within 20 working days and by the date of the internal review.
 - In relation to point 3 and 3.1 and points 7 and 9, the council failed to provide all of the requested information it held and therefore breached regulation 5(1) and 5(2) of the EIR. The authority has agreed to provide the outstanding information and the notice does not therefore need to order any steps for the authority to take.

Steps Required

36. The Commissioner requires no steps to be taken.

Right of Appeal

37. 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,

LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

38. 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.
39. 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 21st day of September 2011

Signed

**Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
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Wilmslow
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SK9 5AF**

Legal Annex – Environmental Information Regulations 2004

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 9 - Advice and assistance

Regulation 9(1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

Regulation 9(3) Where a code of practice has been made under regulation 16, and to the extent that a public authority conforms to that code in relation

to the provision of advice and assistance in a particular case, it shall be taken to have complied with paragraph (1) in relation to that case.

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(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 applicant's request is received;

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 –

- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
 1. was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 2. did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 3. has not consented to its disclosure

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).