

Environmental Information Regulations 2004

Decision Notice

Date: 18 July 2011

Public Authority: London Borough of Lambeth
Address: Lambeth Town Hall
Brixton Hill
London
SW2 1RW

Summary

The complainant requested the London Borough of Lambeth Council (the "Council") to supply all reports, emails, letters, records of telephone calls and any other communication, discussion or meeting relating to the different drafts of a report on the Streatham Hill railway depot development by the Frazer-Nash consultancy. The Council provided the information it held to the complainant and confirmed that it did not hold any further recorded information beyond that which had already been provided. As the complainant remained dissatisfied and believed further recorded information must be held, he approached the Commissioner.

The Commissioner has determined that the Environmental Information Regulations 2004 (the "EIRs") applied. He decided that the Council had not recognised that the EIRs applied to the requested information. The Commissioner is satisfied on a balance of probabilities that the Council holds no further information with regard to this request other than what it had already provided to the complainant in response to previous requests and therefore concluded that it had complied with regulation 5(1) of the EIR in this case.

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. On 23 March 2010 the complainant made the following request for information from the Council:

"Please supply all reports, emails, letters, records of telephone calls and any other communication, discussion or meeting relating to the different drafts of the report on the Streatham Hill railway depot development by the Frazer-Nash consultancy."

3. On 21 April 2010 the Council responded to the complainant's request.

4. On 21 October 2010 the complainant wrote to the Council asking for an internal review:

"On reviewing the documents sent in response to my FoI request I note that there is nothing post October 2007 apart from the Frazer-Nash report itself of February 2008.

I specifically asked for correspondence, emails and records relating to the various versions of the Frazer-Nash report which would clearly have included the final February 2008 report. Would you therefore please produce all so far undisclosed requested material relating to the revision of the Frazer-Nash report up to March 2008 when it was received by the Council."

5. An internal review was carried out on 8 November 2010 (though the complainant disputed having received it) that confirmed no further information was held and the Council had responded in full to the complainant's request.

The Investigation

Scope of the case

6. On 10 November 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 the following points:

- that the Council had failed to supply information sought in his original request;
- that it had been disclosed at a Public Inquiry in April 2010 that there had been previous versions of the report which had reached entirely

different conclusions from the final version presented to the committee;

- that the Council had responded to his request with irrelevant documentation but no communications or other correspondence relating to the final version of the Report.

Chronology

7. On 4 April 2011 the Commissioner wrote to the Council asking detailed questions about the nature of the searches conducted in order to establish what was held or not held with regard to the complainant's request for information.
8. On the same day he wrote to the complainant outlining the scope of his investigation and emphasising that he followed the lead of a number of Information Tribunal decisions by applying the civil standard of the balance of probabilities.
9. On 27 April 2011 the Council replied, confirming unequivocally that it held no further information pertaining to the complainant's request, other than what had already been supplied to him. It explained that relevant information held in email accounts and paper files had already been supplied to the complainant. The Council outlined how searches of the relevant email accounts had been carried out along with relevant manual files. Additionally it listed certain keywords that had been searched. The Council said that no information had been withheld or destroyed.
10. On 11 May 2011 the Commissioner asked further questions of the Council in relation to its 27 April 2011 response. He requested the Council:
 - clarify a reference to a lack of notes regarding telephone conversations in the Council's response, and;
 - establish whether the Council held any previous versions of the report on the Streatham Hill railway depot development by the Frazer-Nash consultancy at the time of the complainant's response. The Commissioner also asked if the Council had ever held this information in manual or electronic form and, if so, whether there was any record of its destruction.
11. On the same day the Council confirmed the following to the Commissioner:
 - no notes were taken of telephone conversations between the complainant and the Council as they were non-specific;

- the complainant had received a copy of the original draft and the final report, together with all ad hoc information that existed;
 - the complainant had been sent all documentation that existed pertaining to his request, and;
 - no documentation had been deleted or destroyed.
12. On 12 May 2011 the Commissioner wrote to the complainant to explain that he accepted that the Council held no further information with regard to his request. The Commissioner acknowledged that the complainant's view was different. He explained to the complainant that he was only able to determine whether, on the balance of probabilities, further information is held (this approach has been supported by the Information Tribunal in a number of cases such as *Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072)). The Commissioner explained that in considering the balance of probabilities test he had looked at:
- the scope, quality, thoroughness and results of the searches, and;
 - other explanations offered as to why the information is not held.
13. The complainant clarified that he was not interested in earlier versions of the consultancy report. He did, however, want communications relating to the commissioning of the later version of the report.
14. On 27 May 2011 the Commissioner explained to the complainant that his correspondence with the Council encompassed the whole request. He further explained that he was only able to investigate this type of complaint by asking questions. Having asked those questions and received unequivocal responses, he had to accept that the Council did not hold anything further pertaining to the complainant's request at the time of that request. Without evidence to the contrary, the Commissioner explained, he could not take this matter further.

Analysis

Substantive Procedural Matters

Regulation 2

15. The Commissioner has considered whether the information requested by the complainant is environmental information as defined by the EIR.
16. The Commissioner considers that the information requested falls within regulation 2(1)(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 these elements". Information about a plan or a measure or an activity that affects or is likely to affect the elements of the environment is environmental information. The Commissioner therefore considers the information requested by the complainant to be environmental information.

Regulation 5

17. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request. Regulation 5(2) states that this information shall be made available as soon as possible and no later than 20 working days after the date of receipt of request.
18. In determining whether a public authority does hold any requested information the Commissioner uses the normal standard of proof, the civil standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the two points listed in paragraph 12.
19. On 4 April 2011 and on 4 May 2011 the Commissioner asked the Council a number of questions relating to the bullet points listed in paragraph 12, in order to establish what it held with regard to the requested information.
20. Having considered the Council's responses the Commissioner is satisfied, on a balance of probabilities, that it does not hold any further information that has not already been supplied to the complainant.
21. In reaching this conclusion the Commissioner has noted the comments provided by the complainant but does not consider these provide any additional information that would enable him to reach a different conclusion. The Commissioner is satisfied that the Council has responded categorically enough to make further investigation unnecessary. Whilst a determination that information is not held can never be certain, the Commissioner considers that the Council's responses were sufficient to satisfy the balance of probabilities test referred to above, and that there were no further steps he would ask it to take. Having considered the Council's response the Commissioner is therefore satisfied that it does not hold any further information that has not already been supplied to the complainant.

The Decision

22. The Commissioner's decision is that no further information requested is held by the Council that has not already been provided to the complainant. Therefore:
- the Council did not breach the requirements of Regulation 5(1) in failing to provide any further information.

Steps Required

23. No further information to that which has already been supplied is held and the Commissioner requires no steps to be taken.

Right of Appeal

24. 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: 0300 1234504

Fax: 0116 249 4253

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

Website: www.informationtribunal.gov.uk

25. 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.
26. 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 18th day of July 2011

Signed

**Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
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 –

- (g) 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;
 - (h) 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);
 - (i) 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;
 - (j) reports on the implementation of environmental legislation;
 - (k) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
 - (l) 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.