

Environmental Information Regulations 2004 (EIR)

Decision Notice

Date: 28 October 2014

Public Authority: Department of the Environment
Address: 10-18 Adelaide Street
Belfast
BT2 8GB

Decision (including any steps ordered)

1. The complainant requested information about a planning decision. The Department claimed that it did not hold the requested information. The Commissioner's decision is that the Department does not hold the requested information and was therefore entitled to rely on the exception at regulation 12(4)(a) of the EIR. However the Commissioner also finds that the Department did not respond to the request in accordance with the time for compliance under the EIR.

Request and response

2. The request that is the subject of this decision notice follows a separate but linked complaint made to the Assembly Ombudsman for Northern Ireland and Northern Ireland Commissioner for Complaints (the Ombudsman), in relation to a particular decision taken by the Planning Service.
3. The Planning Service is part of the Department of the Environment for Northern Ireland. Therefore the Department is the public authority for the purposes of the EIR, and the decision notice relates to the Department for clarity.
4. Having investigated the complaint about the planning decision, the Ombudsman advised the complainant on 19 April 2013 of his finding as follows:

"My investigation established that DoE Planning had failed to provide information which demonstrated how its decision to approve the planning application was made..."

"During the course of my investigation I obtained a written explanation from DoE Planning detailing how the decision to approve the planning application was reached. I shared this letter with you (and [name of individual]) at the conclusion of this case."

5. The Ombudsman also referred to guidance produced by the Department titled "The Content of Development Management Officer Reports, Corporate Decision Making and Proper File Management", and in particular point (ix) which states:

"If in the opinion of the DMG a case officer's recommendation should be changed, a detailed reasoning behind this decision must be included or appended to the report".

6. The complainant subsequently exchanged correspondence with the Department on the issue. On 5 November 2013 the Department provided the complainant with a copy of the Planning Report in respect of the planning application. The Department confirmed that this report contained the only recorded information relating to its decision to approve the planning application.
7. On 20 November 2013, the complainant requested the following information from the Department:

"The 'detailed reasoning' of the DMG behind the decision made by the DC Group to grant planning consent with regard to planning application reference [planning reference and address]. I seek the full disclosure of the 'detailed reasoning' of the DMG to grant consent, as was required under note point (ix) of DoE Guidance to staff, because the case officer's recommendation was overturned. The documentation I request would relate to the 'brief summary of the DC Group discussion' that you have already supplied to me in your letter of 5th November 2013".

8. The Department responded on 3 December 2013 but did not address the information request under the provisions of the EIR. The Department advised that the issue had been dealt with by the Ombudsman's investigation.
9. On 6 December 2013 the complainant wrote to the Commissioner. The complainant referred to the Ombudsman's finding that the Department had "failed to provide information" in respect of the planning decision. The complainant was of the view that this meant that the Department was withholding information which it ought to have disclosed to the complainant.

10. The Commissioner wrote to the Department on 9 January 2014 in respect of the complaint. The Commissioner pointed out that the Department ought to have treated the complainant's letter of 20 November 2013 as a request for information under the EIR. The Commissioner told the Department to reconsider the request and issue a response compliant with the provisions of the EIR.
11. The Department wrote to the complainant on 20 January 2014. This letter acknowledged that the request fell to be considered under the EIR and stated that the requested information was not held. The Department stated that it had already provided all the information it held. No exceptions were cited, and although details of the right to request an internal review were included the letter did not include contact details for the Information Commissioner.
12. On 24 January 2014 the complainant wrote to the Department to challenge its response. On the same date the complainant also asked the Commissioner to investigate as he did not accept the Department's claim that it did not hold the requested information.
13. The Commissioner advised the complainant that he would need to allow the Department to complete its internal review before he would investigate. Although the complainant had already complained to the Department about its response he explicitly requested an internal review on 19 February 2014.
14. The complainant wrote to the Commissioner again on 20 February 2014 to confirm that he had requested an internal review.
15. On 8 May 2014 the complainant wrote to the Department to complain that he had not yet received the outcome of the internal review. The complainant copied this letter to the Commissioner.
16. The Commissioner wrote to the Department on 2 June 2014 asking that it complete the internal review and advise the complainant of the outcome. Following a number of reminders the Department responded to the Commissioner on 11 August 2014, and maintained its position.

Scope of the case

17. The complainant's position as expressed to the Commissioner is that the Department has withheld the requested information, ie a detailed explanation as to its decision to approve a particular planning application. The complainant does not accept the Department's explanation that it does not hold this information.

18. In his letter to the Commissioner dated 20 February 2014 the complainant also complained to the Commissioner that the Department had failed to publish the "detailed reasoning" proactively as required by European Directive 2003/4/EC (the Directive). The Directive has been transposed into UK law via the EIR, and regulation 4(1) sets out the requirement for public authorities to publish environmental information proactively. However in this case the substantive issue is whether the information is held, since an authority cannot be expected to publish, proactively or otherwise, information that it claims not to hold. Therefore the Commissioner has not considered regulation 4 in this decision notice.
19. The Commissioner will normally expect complainants to have exhausted the public authority's internal review procedure before making a complaint under the EIR. This is because the EIR provides a statutory right of internal review. In this case the Commissioner wrote to the Department on 2 June 2014 to request that it communicate the outcome of the internal review to the complainant. The Department responded to the Commissioner, but did not communicate the outcome of the internal review to the complainant as requested. Given the Department's handling of the request until this stage the Commissioner considered it appropriate to accept the complaint as valid.
20. The scope of the case is therefore to investigate whether the Department holds the requested information. The Commissioner has also considered the procedural elements of the Department's handling of the request under the EIR.

Reasons for decision

Regulation 12(4)(a): information not held

21. Regulation 12(4)(a) of the EIR provides that a public authority may refuse to provide the requested information to the extent that it does not hold that information when the request is received.
22. The key question in this case is whether the Department holds information comprising "detailed reasoning" as requested by the complainant. When considering whether information is held, the Commissioner uses the civil standard of proof, i.e. whether it is likely or unlikely on the balance of probabilities. This approach has been supported by the Information Rights Tribunal in a number of previous judgments.
23. The complainant is unable to provide the Commissioner with evidence that the information is in fact held, but argues that the Department is

expected and required to maintain records of its decision making. The complainant is of the view that this is an essential part of transparency in public sector decision-making by facilitating (both internal and external) scrutiny of the decisions made by officials. The complainant has also referred the Commissioner to the Ombudsman's finding of "failure to provide information".

24. The Commissioner agrees that the Ombudsman's findings are relevant to this case. In particular the Commissioner notes the Ombudsman's letter to the complainant dated 29 March 2012 which confirms the Ombudsman's view that the Department's record keeping was "deficient". The Ombudsman did not explicitly find that the Department did not hold information explaining its decision, but he did find that the Department failed to provide that information to the complainant in relation to her planning dispute. Following the Ombudsman's investigation the Department produced a more detailed explanation of its decision, which was provided to the complainant.
25. The Department has also referred the Commissioner to the Ombudsman's investigation and finding of failure to provide information. The Department says it cannot provide any further information to the Commissioner which would explain why it does not hold the requested information. The Department also points out that it provided further information to the complainant as a result of the Ombudsman's investigation, as indicated above. The Department says it simply does not hold any further information.
26. The Commissioner appreciates the complainant's understandable frustration at the Department's failure to provide records of the reasoning behind its decision. However the Commissioner has emphasised to the complainant that he can only consider whether recorded information is in fact held, he cannot consider whether information ought to be recorded or held. Whether information ought to be recorded is a matter for the Ombudsman, who has made a finding of maladministration in this regard. The Commissioner is thus mindful that the "record keeping" issue has been investigated and addressed by the Ombudsman.
27. The Commissioner has seen no evidence to suggest that the Department sought to conceal any relevant information, either from the Ombudsman or from the complainant. Nor has the complainant has provided any evidence that the Department does in fact hold any relevant information that has not already been disclosed.
28. The Commissioner has also considered whether, if he were to uphold the complaint, he could identify any remedial steps that the Department could be required to take. For example, the Commissioner could instruct

the Department to undertake a more thorough search if he found that the initial search was inadequate. However the Commissioner considers that in this case a further search would not be proportionate since there is no evidence to suggest that the Department does hold the information. Consequently the Commissioner is of the view that there is nothing more he can oblige the Department to do in relation to the complainant's request. In conclusion the Commissioner finds on the balance of probabilities that the Department does not hold the requested information.

Procedural requirements

Refusal notice

29. If a public authority refuses a request for environmental information it is obliged under regulation 14 of the EIR to issue a refusal notice. Regulation 14(3) provides that this notice must specify the reasons not to disclose the requested information, including any exception relied on.
30. In this case the Department refused the request on the grounds that it did not hold the requested information. Therefore the Department ought to have cited the exception at regulation 12(4)(a) of the EIR. Neither the Department's letter of 3 December 2013 nor that of 20 January 2014 cited any exception, despite the fact that the Commissioner had reminded the Department of its obligations under the EIR. The Department did state that the requested information was not held, but the failure to cite the appropriate exception constitutes a failure to comply with regulation 14(3) of the EIR. Furthermore, under regulation 14(2) a refusal notice must be issued within 20 working days after the date of receipt of the request; therefore the Department did not conform to this time for compliance.

Internal review

31. Regulation 11 of the EIR provides that a public authority must conduct an internal review if requested by an applicant. Regulation 11(4) provides that the review must be completed within 40 working days.
32. The complainant wrote to the Department on 24 January 2014 to challenge its response. This ought to have been treated as a request for internal review. However, despite the Commissioner's intervention the Department failed to communicate the outcome of the internal review to the complainant. Therefore the Commissioner also finds that the Department failed to comply with regulations 11(3) and 11(4) of the EIR. As the Commissioner has been able to complete his investigation and make a finding in this case he does not require the Department to take any further action with regard to the internal review.

Other matters

33. The complainant has advised the Commissioner of his concern about “a systemic failure in the administration of the Planning Service”. The Commissioner’s remit is limited to considering the Department’s handling of requests made under the FOIA and EIR. Administrative failures and associated maladministration are the remit of the Ombudsman.

Right of appeal

34. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Tribunal website.
36. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Alexander Ganotis
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