

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 1 March 2017

Public Authority: Lake District National Park Authority (LDNPA)
Address: Murley Moss
Oxenholme Road
Kendal
LA9 7RL

Decision (including any steps ordered)

1. The complainant requested a copy of the full planning file, and in particular a copy of any communication between LDNPA and Cumbria Highways, in respect of a specific planning application.
2. The Commissioner's decision is that the request is for environmental information and therefore the EIR is the correct information access regime to apply.
3. LDNPA provided some of the requested information, however advised the complainant that in respect of communications with Cumbria Highways it did not hold the information. The Commissioner's decision is that, on the balance of probabilities, LDNPA does not hold any communications with Cumbria Highways in relation to this planning application and so regulation 12(4)(a) of the EIR applies.
4. The Commissioner does not require LDNPA to take any steps.

Request and response

5. On 9 July 2016 the complainant wrote to LDNPA and requested information in the following terms:

"A copy of the full planning file for planning application number 7/2013/5194."

6. LDNPA responded on 18 July 2016. It referred the complainant to a website link, advising her which documents were publicly available on it's website. It went on to inform her:

"If you would like to see any representations, you can either make an appointment to see the file or we can copy those representations for a fee to cover photocopying etc. Please could you let us know?"

7. On 19 July 2016 the complainant clarified that she required:

"all other documents within this planning application; including photographs, e-mails, notes of telephone calls and meetings....."

8. LDNPA responded via email on the same date attaching a number of electronic copy documents.

9. On 28 July 2016 the complainant contacted LDNPA about it's response, informing it that she did not consider that the information provided included the complete planning file for a number of reasons. In particular the complainant stated:

"In the report from your website, labelled committee report [2013-5194DCC.pdf], dated weds august 7th 2013, it is stated on the front page that 'highway authority no response'. This implies that the planning authority made contact with the 'highway authority'. I can see nothing in the attachments supplied that this occurred – I requested the entire planning application be made available. Did the LDNPA check that the highway authority had received information concerning this application?"

10. LDNPA replied by informing the complainant that a letter addressed to Cumbria Highways was sent as a PDF attachment in an email to Cumbria Highways.
11. The complainant therefore asked for a copy of the email together with the PDF attachment and any 'read receipt' or acknowledgement from Cumbria Highways.
12. On 31 August 2016 LDNPA contacted the complainant and provided her with a copy of the standard consultation letter which would have been sent to Cumbria Highways. LDNPA was unable to confirm the time the email was sent and informed the complainant that the actual letter sent was not printed off and kept on file. LDNPA also advised the complainant that Cumbria Highways did not reply to the consultation and that it does not ask for receipt of consultation letters.
13. The complainant responded to LDNPA on the same day and informed it that the information it had sent her was not what she had requested and

that what she required was the *actual* email sent, including the senders and recipient's address, and the date and time sent. She informed LDNPA that she had been advised by Cumbria Highways that it had not received an email from LDNPA in respect of the planning file, the subject of the request and accordingly she required proof that this had occurred.

Scope of the case

14. The complainant contacted the Commissioner on 21 September 2016 to complain about the way her request for information had been handled in that she had not been provided with all of the information falling within the scope of her request. In particular the complainant was concerned that she had not received a copy of the email sent by LDNPA to Cumbria Highways nor proof that the email was received.
15. The Commissioner is therefore concerned with whether LDNPA handled the request of 9 July 2016 in accordance with the EIR. In particular the Commissioner considers that the scope of the case is whether regulation 12(4)(a) EIR was applied correctly by LDNPA in respect of the information which the complainant considers is outstanding from her request.

Reasons for decision

Environmental information

16. The request and subsequent correspondence from the complainant to LDNPA referred to FOIA, as did internal communication within LDNPA when handling the request. For the sake of clarity the Commissioner has considered which access regime to apply in this case.
17. If requested information is environmental information then it should be considered under the EIR. Environmental information is defined under regulation 2(1) of the EIR:

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

18. In this case the complainant has asked for information related to a planning application. In the Commissioner's view such information clearly relates to an element of the environment and to 'measures' designed to protect that element of the environment, and therefore falls within the definition of environmental information in regulations 2(1)(a) and 2(1)(c) of the EIR.

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

19. Under regulation 12(4)(a) of the EIR a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
20. All the exceptions under the EIR are subject to the public interest test, including regulation 12(4)(a). However, the Commissioner can see no practical value in applying the test where information is not held and she does not expect public authorities to do so.
21. Where there is a difference between the amount of relevant information identified by a public authority and the amount of relevant information that the complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of proof, the balance of probabilities. The Commissioner must

decide whether on the balance of probabilities the public authority holds (or held at the time of the request) any information which falls within the scope of the request.

22. Following enquiries made by the Commissioner on 14 December 2016, LDNPA confirmed that there was no correspondence held in 2015 and 2016 between LDNPA and Cumbria Highways in respect of the planning application which is the subject matter of the request. It also informed the Commissioner that the issue of whether LDNPA should have consulted Cumbria Highways had previously been dealt with by the Local Government Ombudsman (LGO).
23. The complainant responded by stating that in her opinion her request to LDNPA was made whilst the planning application was still 'live' and considered that LDNPA would have a duty of care to retain 'evidence' given that complaints may occur. She also informed the Commissioner that the LGO did not investigate this particular issue as this was a matter occurring over one year ago, and therefore did not agree with LDNPA's assertion on this point. She stated that she required absolute clarity if LDNPA did or did not email Cumbria Highways in relation to the planning application, the subject of her request.
24. The Commissioner contacted LDNPA again on 9 January 2017 seeking clarification on the points raised by the complainant and also making further enquiries as to whether LDNPA had searched for information prior to 2015, on the basis that the complainant had advised her that a planning committee report dating back to 2013 had marked upon it "highway authority no response". The complainant stated that in her view this implied that contact with Cumbria Highways had been made around that time.
25. Furthermore, the complainant has referred to a screen grab provided by LDNPA which appeared to indicate that a consultation letter was sent to Cumbria Highways on 26 April 2013.
26. LDNPA advised the Commissioner that it had checked the planning file, which was on microfiche, and that it held nothing further which it could provide to the complainant.
27. LDNPA also advised the Commissioner at that time that the wording on the planning committee report of 2013 was standard wording used by LDNPA and was not necessarily indicative that communication with Cumbria Highways did occur as this wording could cover a scenario where no contact was made.
28. LDNPA sent the Commissioner a link to the planning file which the Commissioner has checked and has not located any communications

with Cumbria Highways. The Commissioner did note that the only reference to Cumbria Highways is on the planning committee report referred to by the complainant where it is stated on the front page "Highway Authority: No Response".

29. The Commissioner has also looked at the screen grab of LDNPA's document page for the planning application and notes that item 21 is listed as 'initial consultation letters' sent to Cumbria Highways on 26 April 2013. The Commissioner agrees with the complainant that this information implies that a letter may have been sent to Cumbria Highways on 26 April 2013 although is not conclusive.
30. The complainant considers that any email sent to Cumbria Highways will be contained in LDNPA's sent email folder, and as a public body considers that emails will be saved and backed up on it's server. Furthermore the complainant checked with Cumbria Highways who advised her that in response to any consultation letter a standard acknowledgement is generated even if it did not intend to issue a substantive response.
31. Accordingly, on 11 January 2017 the Commissioner made further enquiries with LDNPA which responded on 13 January 2017. It confirmed that following further enquiries with the relevant department, a letter had in fact been sent to Cumbria Highways, as noted on it's system, however LDNPA stated that it *"does not keep a record of the correspondence as it is an automatically generated letter and our system does not retain such a copy but simply notes that the letter has been sent. We therefore do not hold the information requested, which is a copy of that letter."*
32. LDNPA has explained to the Commissioner that the letters sent to the relevant highways authority in respect of any planning application are system generated using a template into which the relevant planning application number is dropped by the staff member preparing the letter. A copy of the letter itself is not saved and retained on the planning file. If any acknowledgement is received by LDNPA from the relevant highways authority it will be received into the outlook account of the staff member who sent the consultation letter and again it is not retained on the planning file.
33. LDNPA has explained that since the email was sent it has upgraded it's systems and so the email will not be retained on it's current system. If held, any record of the email and any acknowledgement would be on the old system. LDNPA has confirmed that it has checked with the relevant staff member who confirms that the email and any acknowledgement is not held on the current system. LDNPA has explained to the Commissioner that staff routinely cleanse their outlook accounts and

that if the number of emails held in outlook reaches close to the system's capacity a system generated email is sent to all staff asking them to cleanse their email accounts. As the email was sent in 2013 LDNPA advises that the email and any acknowledgement will have been deleted in accordance with it's usual practices.

34. The Commissioner further enquired of LDNPA whether it is possible to search the old server or back up tapes for the email to Cumbria Highways and/or any acknowledgement received. LDNPA initially stated that it had considered doing so however to attempt to reboot the old server would take two hours before a search was even conducted. Since the Commissioner commenced her investigation LDNPA has managed to reboot it's old server and confirms that a search for the requested information has been made but the requested information is not held.
35. LDNPA has sent the complainant a copy of the standard blank template letter which would have been sent to Cumbria Highways in 2013, albeit the actual letter sent is no longer held.
36. The complainant is concerned that LDNPA should have retained a copy of any actual communication sent to Cumbria Highways and any acknowledgement on it's file. The EIR is concerned only with provision of recorded information which a public authority holds (or held at the time of the request). It is not within the remit of the Commissioner to consider whether information should be held by a public authority.
37. In this case, LDNPA has provided a reasonable explanation as to why it no longer holds (or held at the time of the request) the requested information. LDNPA did not have a business need to retain and save to the planning file standard emails to various agencies, including Cumbria Highways, nor any acknowledgement received, and deleted these in the course of routine cleansing of it's outlook accounts. Searches of information backed up on it's old server prior the system upgrade have failed to locate the requested information. Whilst it does not hold the actual email sent, LDNPA has sent the complainant a copy of the template letter which would have been used.
38. Without any evidence to the contrary, the Commissioner has found on the balance of probabilities, that whilst LDNPA states it did communicate with Cumbria Highways on 26 April 2013, LDNPA does not hold (or did not hold at the time of the request) any information falling within the scope of the request which has not already been provided to the complainant. Accordingly the Commissioner considers that LDNPA has correctly applied regulation 12(4)(a) of the EIR to the request.
39. As with all the exceptions under the EIR, regulation 12(4)(a) is subject to the public interest test. However since the Commissioner has found

that the information is not held she has not gone on to consider the public interest test in this case .

Procedural matters

40. Regulation 5(2) of the EIR requires public authorities to provide environmental information within 20 working days of receipt of a request.
41. In this case LDNPA provided the complainant with further information on 31 August 2016, particularly a copy of the standard template letter sent to the highways authority. As this information was provided outside 20 working days of receipt of the request the Commissioner's view is that LDNPA failed to comply with regulation 5(2) of the EIR in handling the request.
42. Where no information is held, regulation 14(2) requires a refusal notice to be issued within 20 working days of receipt of the request. Regulation 14(3) EIR states that the refusal shall specify the reasons not to disclose the information requested, including any exception relied upon under regulation 12(4).
43. In this case LDNPA did not specify the exception relied upon in refusing the information relating to the actual communications with the highway's authority and accordingly the Commissioner is of the view that LDNPA failed to comply with regulation and 14(3) of the EIR when handling the complainant's request.

Right of appeal

44. 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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk

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

45. 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.
46. 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

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